DATO' SERI S SAMY VELLU

v.

PENERBITAN SAHABAT (M) SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: S6-23-72-2003]
31 MARCH 2005

CIVIL PROCEDURE: *Contempt of court - Breach of ex parte injunction - Injunction restraining defendants from publishing news articles concerning plaintiff - Order contained discrepancies as to date of publication of articles and name of newspaper concerned - Whether application for committal should be dismissed in limine - Whether defendants had notice of said order before first article published - Second article provided background information as to plaintiff's action against defendants - Whether committal order ought to be issued - Whether breach of said order proved beyond reasonable doubt*

CIVIL PROCEDURE: *Service - Irregularity in service - Service on company - Ex parte injunction order served at registered address after office hours - Whether service effective - Whether first defendant/company had notice of said order - Whether first defendant guilty of breach of said order - Companies Act 1965, ss. 119, 139*

The plaintiff, a current member of the Malaysian cabinet and the President of the Malaysian Indian Congress, commenced a libel action against the first and second defendants for what was termed as a campaign to vilify him as a traitor of the socio-economic interests of the Indian community in Malaysia, as well as suggesting that he was unfit to be a member of the Government. The first defendant publishes the Malaysia Nanban, a Tamil language daily, while the second defendant was the first defendant's editorial advisor. The third defendant was the first defendant's director and was not a party to the plaintiff's libel action.

The plaintiff subsequently obtained an *ex parte* injunction, on 1 December 2003, restraining the defendants from publishing in the Malaysia Nanban, anything concerning the allegations contained in the articles published between 11 and 18 November 2003. The Malay version of the *ex parte* order ('the order'), used the words "pada tarikh 11 November 2003 dan 18 November 2003" whilst the English version of the said order used the words "between 11 November 2003 and 18 November 2003". The order also made reference to the "Malaysian Nanban" as opposed to Malaysia Nanban which is the

daily's correct name. A sealed copy of the order was served at the first defendant's registered address on 2 December 2003 at 5.35pm which was also the address for the first defendant's company secretary. The second defendant received a copy of the order at 9pm on 3 December 2003, while the third defendant was served with a copy of the order at 11am on 3 December 2003. All the cause papers, consisting of the amended writ and statement of claim, the *ex parte* summons-in-chambers and the plaintiff's affidavit in support of the application, were served on the first and second defendant's solicitors on 5 December 2003.

This was the plaintiff's application, by way of notice of motion, seeking to commit the defendants for publishing, or causing to be published, articles in the Malaysia Nanban concerning the plaintiff dated between 11 and 18 November 2003. However, the application in actual fact sought to commit the defendants for the publication of two articles, dated 3 December 2003 (the first article) and 4 December 2003 (the second article) (the first and second articles respectively, reproduced in full in the judgement text). The articles were not referred to in the body of the notice of motion but were mentioned in the grounds in support of the same. The plaintiff claimed that the articles constituted a breach of the order by contravening its direct and unambiguous terms.

Held (dismissing the application):

[1] The notice of motion sought to commit the defendants for articles published between 11 and 18 November 2003. However the impugned articles were those dated 3 and 4 December 2003. The notice of motion was the basis to commit the defendants for contempt and it was crucial that it should be worded accurately.

[2] Further, the ambiguity in the Malay and English versions of the order as to the exact dates of the publication of the articles that were subject to the terms of the order was fatal. The order was unclear and ambiguous, and any doubt arising therefrom should be construed to the benefit of the defendants in view of the fact that the standard of proof required in contempt proceedings is 'beyond reasonable doubt'.

[3] As to the first article, it was published before the defendants had adequate notice of the order. The earliest the defendants would have had proper service of the order was at about 10am on 3 December 2003, by which time the said article would already have been published. Sections 119 and 139 of the Companies Act 1965 clearly require that the service of any

document at a company's registered office through its company secretary must be during office hours. Thus, the purported service of the order on 2 December 2003 at 5.35pm was not effective service.

[4] The second article consisted of background information as to the plaintiff's libel action against the defendants as well as the injunction that was obtained pursuant thereto. It would be unfair for the plaintiff to be permitted to stretch the meaning of the terms of the order beyond what was stipulated therein. Further, since the defendants were not served with any of the relevant cause papers until 5 December 2003, they would not have been aware of the specific terms, phrases and/or issues that would cause a breach of the order.

[5] As for the second defendant, he was an editorial adviser and was never an editor of the Malaysia Nanban. The second defendant was not involved in the publication, writing and/or editing of the first and second articles and therefore could not be said to have been in breach of the order.

Case(s) referred to:

Abdul Khalid Bakar Shah v. Party Islam Se Malaysia (PAS) & Ors [2001] 4 CLJ 15 HC ***(refd)***

AG v. Times Newspapers Ltd [1974] AC 273 ***(refd)***

Attorney-General v. Times Newspaper Ltd [1973] 3 All ER 54 ***(refd)***

Alloy Automotive Sdn Bhd v. Perusahaan Ironfield Sdn Bhd [1986] 1 CLJ 2; [1986] CLJ (Rep) 45 SC ***(refd)***

Allport Alfred James v. Wong Soon Lan [1989] 1 CLJ 271; [1989] 2 CLJ (Rep) 852 HC ***(refd)***

Attorney-General, Malaysia v. Manjeet Singh Dhillon [1991] 1 CLJ 216; [1991] 1 CLJ (Rep) 22 SC ***(refd)***

Canadian Metal Co Ltd v. Canadian Broadcasting Corpn (No 2) [1975] 48 DLR (3d) 641 ***(refd)***

Canadian Newspaper Company v. Canada (Attorney-General) [1988] 43 CCC (3D) 24 ***(refd)***

Chandra Sri Ram v. Murray Hiebert [1997] 3 CLJ Supp 518 HC ***(refd)***

Class One Video Distributors Sdn Bhd & Anor v. Chanan Singh Sher Singh & Anor [1997] 3 CLJ 694 HC ***(refd)***

Crown Zellerbach Canada Ltd v. Annand [1972] 27 DLR (3d) 129 ***(refd)***

Datuk Hong Kim Sui v. Tiu Shi Kian & Anor [1987] 1 CLJ 438; [1987] CLJ (Rep) 1 PC ***(refd)***

Dawkins v. Prince Edward of Saxe Weimar (1875-76) 1 QBD 499 ***(refd)***

Gisborne Herald Co Ltd v. Solicitor-General [1995] 3 NZLR 563 ***(refd)***

Harding v. Tingey [1864] 12 WR 684 ***(refd)***

Husson v. Husson [1962] 3 All ER 1056 ***(refd)***

Iberian Trust Ltd v. Founders Trust & Investment Company Ltd [1932] 2 KB 87 ***(refd)***

Jennison v. Baker [1972] 2 QB 52 ***(refd)***
Johnson v. Grant [1923] SC 789 ***(refd)***
Karpal Singh v. Sultan of Selangor [1987] 2 CLJ 342; [1987] CLJ (Rep) 686 HC ***(refd)***
Kesatuan Pekerja-Pekerja Perusahaan Dunlop Malaysia v. Md Jaafar Abdul Carrim & Anor [1998] 1 CLJ Supp 454 HC ***(refd)***
Lee Lim Huat v. Yusuf Khan Ghows Khan & Anor [1997] 3 CLJ 197 CA ***(refd)***
Lim Kit Siang v. Dato' Seri Dr Mahathir Mohamad [1987] 1 MLJ 383 ***(refd)***
Malayan Banking Bhd v. Yeo Sun Tong [1999] 4 CLJ 425 HC ***(refd)***
Murray Hiebert v. Chandra Sri Ram [1999] 4 CLJ 65 CA ***(refd)***
Northwest Territories Public Service Association v. Comr of the Northwest Territories [1980] 107 DLR (3d) 458 ***(refd)***
PA Thomas & Co v. Mould [1968] 2 QB 913 ***(refd)***
Perwira Affin Bank Bhd v. Lorrain Esme Osman [1996] 4 MLJ 656 ***(refd)***
PP v. Neoh Boon Cheong [1960] 26 MLJ 31 ***(refd)***
Publications Control Board v. William Heinemann Ltd [1965] (4) SA 137 ***(refd)***
R v. David Syme & Co Ltd [1982] VR 173 ***(refd)***
R v. Evening Standard Co Ltd [1954] 1 QB 578 ***(refd)***
R v. Odhams Press Ltd, ex p A.G. [1957] 1 QB 73 ***(refd)***
R v. Thomson Newspapers, ex p AG [1968] 1 All ER 268 ***(refd)***
Re Bramblevale Ltd [1970] Ch 128 ***(refd)***
Re O'Connor, Chesshire v. Strauss [1896] 12 TLR 291 ***(refd)***
Re Regina and Monette [1975] 64 DLR (3d) 470 ***(refd)***
Re Sheppard and Sheppard [1976] 67 DLR (3d) 592 ***(refd)***
Siow Yoon Keong v. H Rosen Engineering BV [2003] 4 CLJ 68 CA ***(refd)***
Sofroniou v. Szgetti [1991] FCR 332 ***(refd)***
Sunrise Sdn Bhd v. First Profile (M) Sdn Bhd & Anor [1997] 1 CLJ 529 FC ***(refd)***
Tiger Powerhitz Sdn Bhd v. Guinness Anchor Marketing Sdn Bhd [2003] 1 MLJ 314
Trustees of Leong San Tong Khoo Kongsi (Penang) Registered & Ors v. SM Idris & Anor and Another Application [1990] 1 CLJ 723; [1990] 1 CLJ (Rep) 293 SC ***(refd)***
W Watson & Sons Ltd v. Garber [1962] 106 So Jo 631 ***(refd)***
Wee Choo Keong v. MBF Holdings Bhd & Anor and Another Appeal [1995] 3 MLJ 549 ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 8(1)
Companies Act 1965, ss. 119, 139
Courts of Judicature Act 1964, s. 13
Evidence Act 1950, s. 81
Federal Constitution, arts. 10(1)(a), 126
Printing Presses Publications Act 1984, s. 6(1)(a)
Rules of the High Court 1980, O. 45 r. 7(6), O. 52 r. 2(2)
Subordinate Courts Act 1948, s. 99A
Subordinate Courts Rules 1980, O. 34, O. 52 r. 1A

Companies Act 1948 [UK], s. 328

Other source(s) referred to:
Gatley on Libel and Slander, 10th edn, p 205
Halsbury's Laws of England, 1974, 4th edn, vol 8, para 834

For the plaintiff - Muhammad Shafee Abdullah (Azhar Azizan Harun, Jeffrey John & Frida Krishnan with him); M/s Shafee & Co
For the defendants - Cecil Abraham (Rajasingam Gothandapani, Cik Thavamali & K Saraswathi with him); M/s Shearn Delamore & Co

JUDGMENT

Abdul Malik Ishak J:

Introduction

(1) The applicant plaintiff had obtained an *ex parte* injunction order as per encl. 9 from the court (my immediate predecessor) on 1 December 2003 (hereinafter the applicant is referred to as the "plaintiff").

(2) Leave to institute committal proceedings was granted to the plaintiff on 4 February 2004 by my immediate predecessor.

(3) By way of a notice of motion as per encl. 36, the plaintiff seeks for an order of committal against the respondents defendants (hereinafter the respondents will be referred to as the "defendants").

The Malay language version of encl. 36 is worded in this way:

> (a) Satu Perintah bahawa Responden Pertama dikenakan denda dan/atau mana-mana pegawai Responden Pertama dipenjarakan; dan
>
> (b) Satu Perintah bahawa Responden Ke-2 sebagai pengarang kepada Responden Pertama dan Responden Ke-3 sebagai pengarah Responden Pertama dipenjarakan;
>
> (c) Apa-apa perintah lain yang difikirkan suai manfaat oleh Mahkamah terhadap Responden-Responden yang menghina Mahkamah yang Mulia ini kerana menyiarkan atau menyebabkan penyiaran artikel-artikel di dalam akhbar Malaysian Nanban di antara 11-11-2003 hingga 30-11-2003 berkenaan dan berhubung dengan Pemohon atas alasan-alasan sepertimana yang dinyatakan di dalam sesalinan Pernyataan yang (di)lampirkan dan diserahkan di sini, digunapakai sewaktu permohonan untuk mendapatkan kebenaran untuk Notis Usul ini;

(d) Satu Perintah bahawa segala kos yang berkaitan dengan permohonan Usul ini dibayar oleh semua Responden-Responden kepada Pemohon;

(e) Relif dan relif selanjutnya yang difikirkan sesuai oleh Mahkamah yang Mulia ini menganggap sesuai.

While the English language version of encl. 36 is worded as follows:

(a) An Order that the 1st Respondent be fined and/or any officer of the 1st Respondent be committed to prison; and

(b) An Order that the 2nd Respondent as the editor of the 1st Respondent and the 3rd Respondent as the director of the 1st Respondent be committed to prison;

(c) Such other order as may seem just to the Court for the Respondents Contempt of this Honourable Court in publishing or causing to be published news articles in the newspaper Malaysian Nanban between 11-11-2003 to 30-11-2003 of and concerning the Applicant upon the grounds set forth in the copy of the statement, served herewith, used in the application for leave to issue this Notice of Motion;

(d) An order that the costs of and occasioned by this Motion be paid by the Respondents to the Applicant;

(e) Further or other relief as the Honourable Court deems fit.

Both these two versions in encl. 36 highlighted the publication of news articles in the newspapers known as Malaysian Nanban between 11 November 2003 to 30 November 2003. Enclosure 36 is supported by the affidavit of the plaintiff that was affirmed on 30 December 2003 as seen in encl. 22.

As I understand it, the notice of motion in encl. 36 seeks to commit the defendants for publishing or causing to be published news articles in Malaysian Nanban between 11 November 2003 to 30 November 2003 concerning the plaintiff. There is no mention at all about the articles dated 3 December 2003 and 4 December 2003. The notice of motion in enclosure 36 is the foundation stone or the basis to commit the defendants for contempt and it is crucial that encl. 36 should be worded accurately and precisely.

(4) The official Malay version of the *ex parte* injunction order of the court dated 1 December 2003 reads as follows (see encl. 9):

> Defendan-Defendan, dan setiap mereka, sama ada bagi diri mereka sendiri, agen-agen atau pekerja-pekerja mereka, atau sebaliknya, dilarang oleh sebuah injunksi, sehingga Perintah selanjutnya oleh Mahkamah yang Mulia ini, daripada mengendalikan dan terus mengendalikan kempen yang

> sedia ada atau sebaliknya, daripada mencetak perkara mengenai Plaintif sama ada di dalam suratkhabar 'Malaysian Nanban', ataupun dicetak di mana-mana terbitan yang lain, yang mengatakan (impute) kepada mana-mana perkara atau pengataan yang terkandung di Lampiran 'A' dan Lampiran 'B' (dilampirkan bersama di dalam permohonan ini) yang terbangkit daripada artikel harian yang telah diterbitkan mengenai plaintif pada tarikh 11.11.2003 dan 18.11.2003 di dalam 'Malaysian Nanban' tersebut.

(5) The English language version of the *ex parte* injunction order of the court dated 1 December 2003 is as follows (see encl. 9):

> The defendants, and each of them, whether by themselves, their agents or servants or otherwise be restrained by an injunction, until further Order of this Honourable Court, from engaging in and continuing with the present campaign or otherwise, of publishing of and concerning the Plaintiff whether in the newspaper 'Malaysian Nanban', or any other publication, imputing any of the matters or allegations contained in Appendix 'A' and Appendix 'B' (annexed to the Summons in Chambers hereto) arising out of the daily articles published of the Plaintiff between 11.11.2003 and 18.11.2003 in the said 'Malaysian Nanban'.

I am now told at the bar, after enquiring, that the Tamil newspaper is known as "Malaysia Nanban" and not "Malaysian Nanban". This meant that the notice of motion in encl. 36 and the *ex parte* order of the court dated 1 December 2003 as per encl. 9 referred to the wrong newspaper. In law, precision with words is an important asset.

Be that as it may, one observation must be made in regard to the Malay language version with that of the English language version of the *ex parte* injunction order of the court dated 1 December 2003. It is this. According to the Malay language version, the key words would be "pada tarikh 11 November 2003 dan 18 November 2003", which refer to the articles published in the "Malaysia Nanban" on 11 November 2003 and 18 November 2003 and not the articles published daily between 11 November 2003 and 18 November 2003 as stated in the English language version of the court order.

I must say that there is a world of difference between the official Malay language version and the English language version of the court order dated 1 December 2003 as seen in encl. 9. There is therefore an ambiguity as to which articles published by the Malaysia Nanban are subject to the terms of the court order dated 1 December 2003. Luxmoore J sitting as an additional judge of the King's Bench Division in *Iberian Trust, Limited v. Founders Trust And Investment Company, Limited* [1932] 2 KB 87 aptly said at p. 95 of the report:

If the Court is to punish any one for not carrying out its order the order must in unambiguous terms direct what is to be done.

It is to be observed that the court order dated 1 December 2003 as per encl. 9 makes no mention at all about the articles dated 3 December 2003 and 4 December 2003.

(6) Now, since encls. 36 and 9 make reference to the wrong newspapers and it does not refer to the two articles, this court is constrained to and should dismiss enclosure 36 with costs forthwith. In fact, encl. 36 should be dismissed in limine.

Lest I be accused of an oversight and, in the event, I am wrong in arriving at this decision (commonsense should prevail here), I will now proceed to examine the arguments of the parties.

(7) The "matters or allegations" as "contained in Appendix 'A' and Appendix 'B'" must be reproduced and I shall do so now:

"Appendix 'A'

The matters listed in paragraph 10 of the Statement of Claim, under the particulars of falsity, are as follows:

(1) That the plaintiff 'pawned and cheated' the Indian community.

(2) That the plaintiff indulges in fraudulent activities, such as cheating people by telling lies and swindling people.

(3) That the plaintiff has included 'phantom members' in the "MIC" (referring to Malayan Indian Congress) and he has therefore cheated the Barisan National.

(4) That the plaintiff designated nine (9) million Telecom shares to RM2.00 companies.

(5) That Maika is to wound-up due to the plaintiff's irresponsible leadership of it and further the plaintiff has misappropriated funds belonging to Maika.

(6) That the plaintiff is collecting money from the public for a private company under the guise of donations to MIC's Medical University.

(7) That the plaintiff has committed a crime under the Official Secrets Act in relation to matters pleaded in paragraph 12(2) herein.

(8) That the plaintiff treats his party members as slaves and has silenced the Indian community by his arrogance.

"Appendix 'B'

The matters listed in paragraph 13 of the Statement of Claim, under the particulars of libel, are as follows:

(1) That the plaintiff is a liar, (a) cheat, (a) thief and (a) criminal.

(2) That the plaintiff has unlawfully profited by his position and office.

(3) That the plaintiff has enriched himself at the expense of the Indian community.

(4) That the plaintiff has betrayed the Indian community.

(5) That the plaintiff has committed an act of treachery against the economic interest of the Indian community.

(6) That the plaintiff has perpetrated a fraud against the shareholders of Maika Holdings.

(7) That the plaintiff is unfit to be the President of MIC or be a Minister of the Government and/or to speak for and on behalf of the Indian community.

It is obvious that one's adrenalin gland would be stirred upon reading both the Appendixes.

(8) The plaintiff's notice of motion in encl. 36 for an order of committal against the defendants is said to be based, although it is not reflected in the main body of encl. 36 itself, on two articles published in the first defendant's newspaper known as Malaysia Nanban. The two articles may conveniently be stated as follows:

(a) the article that was printed and distributed on 3 December 2003 (hereinafter it is referred to as the "first article"); and

(b) the article that was printed and distributed on 4 December 2003 (hereinafter it is referred to as the "second article").

Although both the two articles – referring to the first article and the second article, were not mentioned in the body of the notice of motion in encl. 36 yet they were mentioned in the grounds in support of the notice of motion which are also found in encl. 36 itself. Paragraphs 7 and 8 of the grounds in support of the notice of motion made reference to the two articles and they are worded in this way:

7. On 3.12.2003, the 1st Respondent in complete disregard and disobedience to the said Order wilfully and surreptitiously published an article in English in the front page of the newspaper Malaysian Nanban under the heading, 'Dear PM, Please help us!!, denigrating and vilifying the Applicant.

8. Further on 4.12.2003, the 1st Respondent again in complete disregard and disobedience to the terms of the said Order wilfully and surreptitiously published an article in the newspaper Malaysian Nanban under the heading 'The Issue of 66 Thousand Poor Indians Invested in Maika'. 'Samy Vellu obtains Interim Injunction Against Nanban'.

Again it makes reference to the wrong newspaper. It refers to "Malaysian Nanban". It should be "Malaysia Nanban".

(9) It is the contention of the plaintiff that the publication of the two articles constituted a breach of the *ex parte* order of the court dated 1 December 2003 as seen in encl. 9.

(10) The statement pursuant to O. 52 r. 2(2) of the Rules of the High Court 1980 ("RHC") in encl. 20 annexes the full text of the first article as well as the second article. I must be forgiven for reproducing these two articles.

The first article that appeared in the Malaysia Nanban on 3. December 2003 was worded in this way:

Datuk Seri – you are our only hope !

Dear PM, Please help us!!

Poor Indians – who invested RM106 million in Maika – Making this plea to our PM

We appeal to the Honourable Prime Minister to help the thousands of poor Indians who invested RM106 million in Maika Holdings Berhad 20 years ago!

We appeal to Yang Amat Berhormat to help us. We have been affected by Datuk Seri S. Samy Vellu who is at the helm of the party, which is supposed to protect the interest of the Indian Community. We sincerely hope that Yang Amat Berhormat and the Government will sense our sad plight.

Datuk Seri S. Samy Vellu's Leadership has ruined the Community's investment arm. Samy Vellu cannot deny that Maika has lost in its very objective of formation. Samy should take full responsibility for its failures.

Maika shareholders who questioned about its poor performances in past have been beaten up by those who were closely associated with Dato' Seri S. Samy Vellu. Painful truth!

Maika Holdings Sdn. Bhd. was started by Dato' Seri S. Samy Vellu with his assertive promises that every cent of the poor men's money will be utilised in the projects devised by the Government. He also promised the Indians that through Maika he will improve the economic wealth of the community from 1% to 7% by year 1990.

One Bank officer who worked in Jalan Melaka UAB (now known as Bumiputra Commerce Bank Berhad) recalled that there were elderly, uneducated couples who went to his Bank asking if they could pawn their jewellery and gold in order to invest in Maika. They had to turn them away. These poor Indians returned again after pawning it at the pawnshops to buy shares in Maika. That was the amount of trust they had in sincerely wanting a better life for themselves.

Under the government privatisation scheme, the government made sufficient allocation to the Indians. Shares in Telekom, MAS, EON, TV3 etc. were given to Maika. Maika's unjustifiable losses have frustrated the government's assistance to the Indians.

Samy Vellu destroyed our hopes!

Samy just destroyed the hopes of the Indian Community. He failed to deliver his promise to increase the equity participation from 1% to 7% as promised.

Samy has been the sole Minister for the Indian Community for the past 24 years. In the last 20 years the construction industry boomed. Construction and related companies have become huge conglomerate. Samy Vellu being the Minister of Works responsible for the construction of roads etc. did not bring home any benefit to Maika although it had at least 3 subsidiaries in the construction line. What is the benefit of Samy Vellu's ministerial position to the community? Compare Samy Vellu's prosperity with Maika?

All losses?

Maika has so far incorporated or invested in at least 40 subsidiaries. Only 3 or 4 had shown any genuine profit. Samy Vellu has been steering Maika all these while. Now the dire situation of Maika is compounded by his son's interference in the company under the pretext of Company's CEO. Who appointed his son as the CEO? Maika has been sued for RM48,000 for corporate credit card issued to his son! Poor Indians money is being spent for Samy Vellu's son's luxury. Shocking truth!

There is an urgent need to react now to save not only Maika but also other Indian institutions headed by Samy Vellu.

Another Scandal?

To sustain the losses of Maika Subsidiaries under the control of his son, Samy Vellu, as the chairman of MIED collaborated in the hike up of contract price purportedly awarded to Maika subsidiary to cover the loss of RM4 million sustained by the said subsidiary. MIED the education arm of MIC, is being ripped off. Siphoning out money from one entity to another entity is not making profit but ripping off and fooling the community. Soon MIED will become dry and MIED owned colleges would be slowly dissipated.

There must be an end to all these malpractice, misconduct and mismanagement.

Where is the International Hotel!

Samy Vellu had promised to build a 30 storey International Hotel jointly with Maika Holdings on a piece of land wholly owned by MIC. Money was again collected in 1985 through fund raising campaign from the poor Indians to put up the hotel. He later claimed that the land had been sold off to several people. Now the land is partly owned by Samy Vellu! How? No answer!! No accountability!!!

Telekom share Issue!!

9 million out of the 10 million shares allotted to Maika Holdings through Ministry of Finance letter dated 27.9.1990 was revoked by the Ministry of Finance at the misrepresentation by Datuk Seri S. Samy Vellu that Maika had financial (constraints). The 9 million shares were later diverted to 3 private companies only known to Dato Seri Samy Vellu! The proceeds of shares given to these private companies were banked (into) his personal accounts, as admitted by him! This is a clear instance of criminal breach of trust!

Maika would have been in different state only if the 10 million shares had been given to Maika as originally allotted.

The investigations into the Telekom shares issue, which was reopened in 1993 after new evidence emerged, have been put in abeyance for almost 10 years now.

We appeal to Datuk Seri to reactivate the investigations and do justice to these poor investors!

We have the facts, we have the proof. We would come forward with every piece evidence on each of these misconduct and more if proper (investigations) are promised.

This appeal is being made to our beloved Prime Minister on behalf of thousands of poor Indians and Maika members who have lost millions of hard earned money through Maika. Please help us Datuk Seri!

YAB, you are our only hope!!

With tears, thousands of Indians are appealing to you!

The second article that appeared in the Malaysia Nanban on 4.12.2003 was worded like this:

Malaysia Nanban
4 December 2003

The Issue of MAICA Holdings in which 66 Thousand Poor Indians Invested Samy Vellu's Court Injunction Against Nanban

Kuala Lumpur, Dec. 4.

MIC's President Dato Seri Samy Vellu has got an Ex-Parte court Injunction against Nanban newspaper and Mr Athi Kumanan saying that nothing should be written about him related to the issue of MAICA Holdings in which 66 poor Indians had invested RM100 million.

It is a known knowledge that Malaysia Nanban has been publishing the tear stricken stories and raging fury in the hearts of the nationwide shareholders who say, 'Selling our cattle, pawning our jewellery and by bringing all our life's savings we bought shares in MAICA. What has happened to the money?'

National leader of the IPF Party Datuk MG Pandithan who had collected RM7.5 million was raising questions such as what happened to the money he had given? What is the cause of the current status of MAICA? What is your response to the shareholders who are agonised by giving money? Nanban newspaper was publishing these questions.

News such as following the statement released by Datuk Pandithan nationwide shareholders aired their grievances and requesting him to get justice, was also published.

News such as the case filed to close down MAICA (Case of Closing Ceremony) and MAICA money RM1,42,731 spent by Samy Vellu's son Vel Paari and Baradhwaj, a person known to be a foreigner to pay for their credit cards was also published.

Shareholders nationwide are coming in good strength and keep on sharing their tear filled stories. Their heart wrenching anguish saying that they are left helpless without an answer in spite of them begging asking for their investment of the money saved through labouring hard all their lives, was also vividly portrayed by the people's magazine Malaysia Nanban.

Tears of an old man

The scene of a 72 year old man standing with tears and sorrow saying, 'Return my money RM5,000 I invested at least before my body goes to pyre in India', was published with photograph. Among those shareholders invested in MAICA, there are people from all political parties of our nation. All of them are narrating their hurting stories.

In this situation, on behalf of the 66 thousand shareholders asking what will happen to the money we invested trusting Samy Vellu's words saying that he will raise the community in economy and will raise equity of Indians from 1% to 7% was published.

In this state of affairs, Dato Seri Samy Vellu has an Injunction against the management of Malaysia Nanban and Mr Athi Kumanan saying that nothing should be written about him. The inquiry on this injunction will take place on 19 December.

Against the Injunction

Malaysia Nanban will take appropriate action

Kuala Lumpur, Dec 4.

Malaysia Nanban will soon take appropriate legal action against the court injunction obtained by Samy Vellu saying, that in the MAICA issue, which is related to the 66 thousand shareholders, nothing should be written about him.

Athi Kumanan who gave his views on this *Ex-Parte* injunction obtained by Samy Vellu announced that he has asked his lawyers to take up further action.

It is the stand of the plaintiff that the first defendant in complete disregard and disobedience to the *ex parte* injunction order wilfully and surreptitiously published the first article in the front page of the Malaysia Nanban under the heading, "Dear PM, Please help us!!" for the purpose of denigrating and vilifying the plaintiff. And again it is said that in complete disregard and disobedience to the terms of the *ex parte* injunction order the first defendant wilfully and surreptitiously published the second article in the Malaysia Nanban. It is also said that the first defendant on the pretext of reporting the granting of the *ex parte* injunction order had on 4 December 2003 wilfully and surreptitiously laced and interspersed the second article with matters that the said *ex parte* injunction order specifically and expressly prohibits from being published in the Malaysia Nanban.

It is the stand of the plaintiff that the second and the third defendants being the agent and/or servant and director respectively knows of the terms of the said *ex parte* injunction order and that they have either actively assisted in the breach or wilfully failed to take reasonable steps to ensure that the said order was obeyed. Additionally, it is also said that the second defendant having

knowledge of the *ex parte* injunction order assisted the first defendant in the publication of both the articles dated 3 December 2003 and 4 December 2003 and in doing so it is said that the second defendant aided and abetted the first defendant in breaching the said order and/or obstructed or frustrated the object of the said order.

It is the submission of the plaintiff that the first article when read as a whole and in its proper context together with the bold headlines were designed and calculated to excite prejudice against the plaintiff as well as the litigation in respect of the present suit and specifically it was designed to exert pressure upon this Honourable Court to decide the present suit against the plaintiff. It is said that the first article with its bold headlines surreptitiously portrayed a picture that:

(a) the plaintiff has betrayed the Indian community;

(b) the plaintiff has committed an act of treachery against the economic interest of the Indian community; and

(c) the plaintiff is unfit to be the President of the MIC or to be a Minister of the Government and/or to speak for and on behalf of the Indian community.

In short, it is said that the first article directly assailed the express and unambiguous terms of the *ex parte* injunction order.

(11) Going into specifics, the plaintiff states that the first and the second defendants have since October 2003 in conspiracy with one Dato' M.G. Pandithan and one V. Sengutuvan, engaged in a systematic campaign of malicious falsehood and libel of the plaintiff with the sole purpose of injuring the reputation and credit of the plaintiff. The plaintiff submits that the defendants wantonly and maliciously wrote and published in Tamil matters which disparaged the plaintiff and which were untrue and false. It was for these reasons that the plaintiff sought and obtained the *ex parte* injunction order on 1 December 2003.

Having obtained the necessary leave to institute committal proceedings against the defendants, the plaintiff now seeks by way of encl. 36 for an order of committal against the defendants.

Background To The Underlying Libel Action By The Plaintiff

The plaintiff is the President of the MIC and a current member of the Malaysian Cabinet of Ministers. The first defendant publishes the Tamil daily newspaper known as the "Malaysia Nanban". The second defendant is an

editorial advisor of the first defendant and he is not the editor of Malaysia Nanban as alleged by the plaintiff (see the additional affidavit of the first defendant in encl. 34). The third defendant is a director of the first defendant.

On 21 November 2003, the plaintiff commenced a libel action against the first defendant and the second defendant. The third defendant is not a party to the plaintiff's libel action.

As I stated earlier, on 1 December 2003 the plaintiff obtained a prohibitory *ex parte* order otherwise also known as the *ex parte* injunction order as reflected in encl. 9. A sealed copy of the *ex parte* injunction order was served on the first defendant's registered address, which happens to be the office of the first defendant's company's secretary, on 2 December 2003 at 5.35pm. The second defendant received a copy of the *ex parte* injunction order on 3 December 2003 at 9pm. The third defendant was served with the *ex parte* injunction order on 3 December 2003 at 11am.

The entire set of the cause papers consisting of the amended writ, the amended statement of claim, the *ex parte* summons-in-chambers and the plaintiff's affidavit in support of the *ex parte* application were served on the first and the second defendants' solicitors for the very first time on 5 December 2003.

On 2 January 2004, the first and the second defendants delivered a joint defence pleading, *inter alia*, justification and qualified privilege.

A bird's eye view of the timing of the service of the *ex parte* injunction order is indeed crucial. For this purpose, the chronology of events relevant to the committal proceedings would now be set out:

(a) on 1 December 2003

– the plaintiff obtained the *ex parte* injunction order.

(b) on 2 December 2003 at 5.35pm.

– the plaintiff served a copy of the *ex parte* injunction order on the first defendant's company's secretary at 5.35pm (see exh. DSV4 of the plaintiff's affidavit in encl. 22).

(c) on 2 December 2003 at 9pm.

– 3 December 2003 issue of the Malaysia Nanban went to the printer on 2 December 2003 at 9pm (see para. 14 of the second defendant's affidavit in encl. 26 and para. 10 of the first defendant's first affidavit in encl. 31).

(d) on 2 December 2003

– 3 December 2003 issue of the Malaysia Nanban was distributed (see para. 14 of the first defendant's first affidavit in encl. 26 – in fact it is the affidavit of the second defendant).

(e) on 3 December 2003 at 9.30am

– the company secretary informed Sikandar Batcha bin Abdul Majeed, a director of the first defendant, about the service of the *ex parte* injunction order at about 9.30am on 3 December 2003 and that order was collected by Sikandar Batcha bin Abdul Majeed thereafter (see paras 9.1 and 9.2 of the first defendant's first affidavit in encl. 31; and paras 5, 6 and 7 of the first defendant's third affidavit in encl. 29).

(f) on 3 December 2003 at 11am

– the *ex parte* injunction order was served on the third defendant at about 11am (see para. 6 of the third defendant's affidavit in encl. 27; and para. 9.3 of the first defendant's first affidavit in encl. 31).

(g) on 3 December 2003 at 9.15pm

– the *ex parte* injunction order was served on the second defendant at about 9.15pm on 3 December 2003 (see para. 11 of the second respondent's affidavit in encl. 26).

(h) on 4 December 2003

– the first defendant published a news article in 4 December 2003 issue of the Malaysia Nanban about the action filed against it by the plaintiff as well as about the *ex parte* injunction order dated 1 December 2003.

(i) on 5 December 2003

– the amended writ, the amended statement of claim, the *ex parte* summons-in-chambers and the plaintiff's affidavits in support were served on the defendants' solicitors for the very first time.

Notice of the *ex parte* injunction order dated 1 December 2003 by way of service on the defendants

It is the submission of the plaintiff that sufficient notice of the *ex parte* injunction was given to the defendants in the following manner:

(a) as against the first defendant

(i) the first defendant was served with a copy of the *ex parte* injunction order on 2 December 2003 at 5.35pm at its registered address; and

(ii) this fact is confirmed by the affidavit of service that has been exhibited as exh. DSV4 of the affidavit in support as per encl. 22.

(b) as against the second defendant

(i) the second defendant was served personally with a copy of the *ex parte* injunction order on 3 December 2003 at 9pm; and

(ii) this fact is confirmed by the affidavit of service that has been exhibited as exh. DSV5 of the affidavit in support as per encl. 22.

(c) as against the third defendant

(i) the third defendant was served personally with a copy of the *ex parte* injunction order on 3 December 2003 at at 11am; and

(ii) this fact is confirmed by the affidavit of service that has been exhibited as exh. DSV5 of the affidavit in support as per encl. 22 at p. 556.

But the defendants say that there was no adequate notice of the *ex parte* injunction order prior to the publication of the first and the second articles. I will now elaborate further.

The First Article (On 3 December 2003)

It is the defendants' contention that the article dated 3 December 2003 was published before the defendants had adequate notice of the terms of the *ex parte* injunction order dated 1 December 2003 for the following reasons:

(a) the plaintiff served a copy of the *ex parte* injunction order on the assistant company secretary of the first defendant after normal working hours at 5.15pm on 2 December 2003 at the registered office of the first defendant as opposed to the publication office; it is germane to mention that the first defendant's publication office is at its principal place of business and that would be at no: 11, Jalan Murai 2, Batu Kompleks, Off Jalan Ipoh, 51200 Kuala Lumpur (see para. 6 of the first defendant's additional affidavit in encl. 34);

(b) the assistant company secretary by the name of Indrani a/p Subramaniam attempted to inform Sikandar Batcha bin Abdul Majeed, the managing director of the first defendant on the evening of 2 December 2003 but could not manage to do so; that Sikandar Batcha bin Abdul Majeed was subsequently informed of the *ex parte* injunction order "first thing in the morning" of 3 December 2003 as per para. 6 of the first defendant's third affidavit in encl. 29;

(c) that the managing director of the first defendant by the name of Sikandar Batcha bin Abdul Majeed "either by himself or by his representative" collected the *ex parte* injunction order on 3 December 2003 at about 10am (see the first defendant's third affidavit in encl. 29 at para. 7);

(d) the second defendant was served with a copy of the *ex parte* injunction order on 3 December 2003 at 9.15pm (see the affidavit in reply of the second defendant in encl. 26 at para. 11);

(e) the third defendant was served with a copy of the *ex parte* injunction order on 3 December 2003 at 11am (see para. 9.3 of the first defendant's first affidavit in reply in encl. 31); and

(f) 3 December 2003 issue – referring to the first article, went to the printers on 2 December 2003 at 9pm and distributed the same night, that was on 3 December 2003 (see para. 10 of the first defendant's first affidavit in reply in encl. 31).

To sum up, at the very earliest, the defendants would have had good and proper notice of the *ex parte* injunction order dated 1 December 2003 was at about 10am on 3 December 2003, by which time the first article of 3 December 2003 had been published.

It must be borne in mind that the plaintiff does not deny that his solicitors had effected service of the *ex parte* injunction order on the first defendant by delivering a copy of the said order to its registered address only at 5.35pm on 2 December 2003. This assertion can be seen at paras 2 and 3 of the affidavit of service of Pakianathan a/l Anthonysamy that was affirmed on 3 December 2003 annexed as an exh. DSV4 to the affidavit in support of the plaintiff in encl. 22 and that affidavit of service was worded in this way:

> 2. Bahawa saya telah pada 2.12.2003 lebihkurang pukul 5.35 petang telah menyampaikan ke atas penerbitan Sahabat (M) Sdn. Bhd., Defendan Pertama yang dinamakan di atas suatu salinan meterai Perintah bertarikh 1.12.2003 bersama-sama dengan surat iringan Tetuan Shook Lin & Bok, bertarikh 2.12.2003 dengan cara penyampaian ke diri di alamat berdaftar yang dikenali sebagai 26-1A, J. Dewan Sultan Sulaiman 1, Off Jalan Tuanku Abdul Rahman,

51200 Kuala Lumpur, seperti yang tercatat di dalam rekod Pendaftaran Syarikat pada 24.11.2003. Setibanya saya di alamat berdaftar tersebut seorang kerani perempuan India telah memberitahu saya bahawa ianya (Malsystem Consult Sdn. Bhd.) adalah firma kesetiausahaan bagi Penerbitan Sahabat (M) Sdn. Bhd. dan tidak mempunyai cop getah bagi penerbitan Sahabat (M) Sdn. Bhd. lalu kerani tersebut menerima dan menandatangani serta menurunkan cop firmanya di salinan pruf Perintah tersebut. Sesalinan catatan maklumat syarikat daripada rekod Pendaftaran Syarikat tersebut dan surat iringan Tetuan Shook Lin & Bok dilampirkan di sini dengan ditandakan sebagai ekshibit 'PA-1', dan 'PA-2' masing-masingnya.

3. Bahawa saya telah pada 2.12.2003 mengindorskan hari dalam bulan dan minggu bagi penyampaian itu di belakang salinan pruf Perintah tersebut yang bertanda sebagai ekshibit 'PA-3'."

It is ideal to mention that the amended writ as exhibited as exh. DSV1 of encl. 22 does not contain an endorsement of service. So much for compliance with the rules. Be that as it may, the assistant company secretary of Malsystem Consult Sdn Bhd, the company that provides company secretarial services to the first defendant has affirmed an affidavit styled as the first defendant's third affidavit in reply in encl. 29 and there the deponent by the name of Indrani a/p Subramaniam deposed as follows:

4. I crave leave of the court to refer to paragraph 14 of the Plaintiff's Affidavit and wish to state that on 2.12.2003 at about 5.15 p.m. a process server identifying himself as from Messrs Shook Lin & Bok handed to me a letter addressed (to) the First Respondent together with a court document. It was already outside the normal working hours of our office, yet I received the said document on behalf of the company and acknowledged receipt.

5. Thereafter I tried to contact Sikandar Batcha bin Abdul Majeed, the Managing Director of the First Respondent who usually liaise with us on all matters relating to the First Respondent. I tried several times but I could not reach him. As it was already half past six, I left for home.

6. On 3.12.2003 first thing in the morning I called Sikandar Batcha bin Abdul Majeed and informed him that we had received a copy of the letter and the court document the previous day and conveyed to him that it was served on us after usual office hours.

7. Sikandar Batcha bin Abdul Majeed either by himself or his representative collected the said letter and the court documents on 3.12.2003 at about 10.00 a.m.

The Companies Act 1965 requires a company to have a registered office for the purposes of all communications and service of documents during its office hours. Section 119 of the Companies Act 1965 enacts as follows:

119 Registered office of company

(1) A company shall as from the day on which it begin to carry on business or as from the fourteenth day after the date of its incorporation, whichever is the earlier, have a registered office within Malaysia to which all communications and notices may be addressed and which shall be open and accessible to the public for not less than three hours during ordinary business hours on each day, Saturdays, weekly and public holidays excepted.

(2) If default is made in complying with subsection (1) the company and every officer of the company who is in default shall be guilty of an offence against this Act.

[Penalty: One thousand ringgit. Default penalty.]

Then there is s. 139 of the Companies Act 1965 which enacts as follows:

139 Secretary

(1) Every company shall have one or more secretaries each of whom shall be a natural person [of full age] who has his principal or only place of residence in Malaysia.

[(1A) The first secretary of a company shall be named in the memorandum or articles of the company.]

[(1B) The office of secretary of a company shall not be left vacant for more than one month at any one time.]

[(1C) Notwithstanding subsection (1B), where none of the directors of the company can be communicated with at the last-known residential address, the secretary may, notwithstanding subsection 141 (6), lodge with the Registrar a notice in the prescribed form notifying the Registrar of that fact and of his intention to vacate the office of the secretary.]

[(1D) Where the secretary has lodged a notice in accordance with subsection (1C), the secretary shall cease to be the secretary of the company on the expiry of one month from the date of the notice.]

[(1E) Nothing in subsection (1C) and (1D) shall relieve the secretary from liability for any act or omission done before the secretary vacated that office.]

(2) Subsection (1) shall not operate to prevent a corporation which was acting as the secretary of a company immediately before the commencement of this Act from continuing to act as secretary of that company for a period to twelve months after the commencement of this Act.

(3) The secretary or secretaries shall be appointed by the directors and at least one of those secretaries shall be present at the registered office of the company by himself or his agent or clerk on the days and at the hours during which the registered office is to be accessible to the public.

(4) [Subject to subsection (1B), anything] required or authorized to be done by or in relation to the secretary may, if the office is vacant or for any other reason the secretary is not capable of acting, be done by or in relation to any assistant or deputy secretary or, if there is no assistant or deputy secretary capable of acting, by or in relation to any officer of the company authorized generally or specially in that behalf by the directors.

(5) A provision requiring or authorizing a thing to be done by or in relation to a director and the secretary shall not be satisfied by its being done by or in relation to the same person acting both as director and as, or in place of, the secretary.

[(6) Every person shall, before he is appointed a secretary of a company, make a declaration in the prescribed form that he is not in contravention of sections 139A and 139C and that he consents to act as a secretary of the company.]

Both these two sections – referring to ss. 119 and 139 of the Companies Act 1965, fortify the position that the service of any document at the registered office through the company secretary should be during its office hours for it to be deemed as effective service on the company on the date of the service because the said Act clearly requires that the registered office to function during the ordinary office hours only. It is tenable to argue that the registered office is only to facilitate service of documents for and on behalf of the company (s. 119 of the Companies Act 1965). The secretary of the company is not an employee of the company to act or to do more than what is envisaged by the said Act. Thus, in order for the officers of the company to be restrained by "constructive notice" of the service of the *ex parte* injunction order or having notice thereof of the service on the company secretary at the registered address, it must be effected during its normal office hours in order to enable the company secretary to take the relevant actions to communicate to the officers of the company, who would in turn have to give instructions to their subordinates. So, it can be surmised that the purported service of the *ex parte* injunction order on 2 December 2003 at 5.35pm on the first defendant by delivering the said order to its registered office outside the working hours of the secretarial office, which fact has not been denied or disputed, was not effective service. In my judgment, the effective date of service of the ex parte injunction order or notice of the said order on the first defendant could, at the most, be construed to be on 3 December 2003 at about 10am when the said order was collected by Sikandar Batcha bin Abdul Majeed or his representative thereafter (see paras 9.1 and 9.2 of the first defendant's first affidavit in encl. 31; and paras 5, 6 and 7 of the first defendant's third affidavit in encl. 29). By that time, the first article had already been published.

It must be emphasised that although the *ex parte* injunction order was obtained on 1 December 2003, the plaintiff's solicitors did not take any steps to communicate the said order or the terms of the said order to the defendants or to the defendants' solicitors or to the first defendant or to the first defendant's publication office, save for the service thereof at 5.15pm on 2 December 2003 on Indrani a/p Subramaniam. Neither the plaintiff nor his solicitors have afforded any explanation for their omission or delay.

It must also be emphasised that the plaintiff, in para. 20(c) of his affidavit in support of the *ex parte* application for an injunction, has religiously claimed that the justification for the application to be made *ex parte* was because of the "daily publication of the said articles" and that "the defendants have embarked on a campaign of vilification on a daily basis". If this was so (which the defendants vehemently denied), there was all the more reason for the plaintiff to take the necessary steps to bring to the attention of the defendants the restraining order so as to avoid the said order obtained on an *ex parte* basis and pursuant to a certificate of urgency being rendered frustrated. Despite the averment as aforesaid of the plaintiff in his affidavit, the plaintiff has not provided any explanation for the delay in the service of the *ex parte* injunction order that was obtained on 1 December 2003 until it was served on the managing director of the first defendant or his representative on 3 December 2003 at about 10am and on the second defendant on 3 December 2003 at 9.15pm and on the third defendant on 3 December 2003 at 11am. Now, all these delays were indeed fatal. It was the plaintiff's and/or his solicitor's own failure to act expeditiously after securing the said order on 1 December 2003 that gave the opportunity, so to speak, for the first article to be published.

Furthermore, the first defendant's assistant company secretary in her affidavit affirmed on 19 January 2004 as reflected in encl. 29 has clearly and categorically set out that she tried several times to call the first defendant's managing director until 6.30pm on 2 December 2003 but was unsuccessful. The first defendant's assistant company secretary's affidavit in encl. 29 has not been challenged. On the issue of whether the first defendant's assistant company secretary had taken all the reasonable measures to communicate the *ex parte* injunction order to the first defendant, reference to the case of *Tiger Powerhitz Sdn Bhd v. Guinness Anchor Marketing Sdn Bhd* [2003] 1 MLJ 314 should be made. There, just like the present case at hand, the first defendant had explained that all the necessary measures and steps that needed to be taken by the first defendant were indeed taken in order to ensure compliance with the order the moment the first defendant was made aware of the order but due to the shortage of time the publication of the magazine could not be stopped.

In my judgment, the plaintiff should for all these reasons be estopped from unduly relying on the service of the *ex parte* injunction order effected outside the normal office hours as the basis to argue that the first article should not be published at all. As I said, the first article was published before the first defendant had adequate notice of the terms of the *ex parte* injunction order.

Not to be outwitted, the plaintiff has sought to rely on O. 45 r. 7(6) of the RHC to emphasise that there must be a sufficient notice of the terms of the *ex parte* injunction order. Order 45 r. 7(6) of the RHC states as follows:

> An order requiring a person to abstain from doing an act may be enforced under rule 5 notwithstanding that service of a copy of the order has not been effected in accordance with this rule if the Court is satisfied that, pending such service, the person against whom or against whose property it is sought to enforce the order has had notice thereof either:
>
> (a) by being present when the order was made; or
>
> (b) by being notified of the terms of the order, whether by telephone, telegram or otherwise.

But with due respect, O. 45 r. 7(6) of the RHC is inapplicable to the facts of the present case for the following reasons:

(a) the defendants were not present in court when the *ex parte* injunction order dated 1 December 2003 was pronounced (r. 7(6)(a) of O. 45 of the RHC); and

(b) the defendants were not notified of the terms of the *ex parte* injunction order dated 1 December 2003 prior to 3 December 2003 by way of telephone, telegram or otherwise (r. 7(6)(b) of O. 45 of the RHC).

It is germane to mention that the plaintiff could have taken the necessary steps to bring the terms of the *ex parte* injunction order to the defendants' attention on 1 December 2003 or on the following day by serving by way of a letter an approved draft copy of the said order. But alas, no such steps were undertaken by the plaintiff.

The second and the third defendants' stand are rather simple. They say that they cannot be held liable for the publication of the first article. The question to ask would be this: when did the second and the third defendants have notice of the *ex parte* injunction order? The answer would be this. That the earliest that both of them would have notice of the *ex parte* injunction order would have been on 3 December 2003 at 11am in the morning by taking the time of service on the third defendant. By the plaintiff's own submission, the effective date of service would be on 3 December 2003 and that would be after publication of the first article. The plaintiff submits as follows:

> In this instance the first respondent (referring to the first defendant) was served with a copy of the order vide its company secretary on 2.12.2003. Notice amounting to knowledge of the order on the directors of the first respondent (referring to the first defendant) was effected on 3.12.2003 when a copy of the order was collected by the director of the first respondent (referring to the first defendant), Sikandar Batcha bin Abdul Majeed on 3.12.2003 on 10.00 a.m. This would now make this notice effective against all the directors of the first defendant named in the order.

So, it is evidently clear from the plaintiff's own submissions as reproduced above that the committal proceedings as against the second and the third defendants in respect of the first article are wholly misconceived and untenable.

It is a fallacy to rely upon the case of *Class One Video Distributors Sdn Bhd & Anor v. Chanan Singh a/l Sher Singh & Anor* [1997] 3 CLJ 694. There the second defendant had the benefit of counsel's advice and so he was deemed to know the terms of the order. Moreover, the second defendant there did not deny that he had knowledge of the terms of the order. Here, factually speaking, the first article dated 3 December 2003 was published even before the defendants had adequate and appropriate notice of the terms of the *ex parte* injunction order. There was also no averments in the affidavits to show that the defendants had legal advice upon receipt of the *ex parte* injunction order.

Again, factually speaking, the case of *Datuk Hong Kim Sui v. Tiu Shi Kian & Anor* [1987] 1 CLJ 438; [1987] CLJ (Rep) 1, a decision of the Privy Council can readily be distinguished. There the solicitors wrote to the alleged contemnors about the terms of the order but the alleged contemnors refused to abide by the injunction order. Here, nothing of that sort ever happened. Of course as pointed out by Sir Ivor Richardson, who delivered the decision of the Privy Council, that "where the director has appropriate notice" then "he is liable to process of execution if the company disobeys the order". Here, Sikandar Batcha bin Abdul Majeed – the managing director of the first defendant, had "ether by himself or by his representative" collected the *ex parte* injunction order on 3 December 2003 at about 10am as per the averment at para. 7 of encl. 29. But by then it was too late. The first article had been printed and distributed. Sikandar Batcha bin Abdul Majeed cannot be blamed. He should be exonerated in respect of the first article.

On notice, generally, I need to cite two further authorities.

The first would be the case of *Husson v. Husson* [1962] 3 All ER 1056, a decision of Lyell J who wrote a very short judgment. In that case, the defendant was in court when the injunction restraining him from molesting his wife was made and there Lyell J held that it was sufficient to show that the defendant had notice of the injunction by his presence in court when it was granted.

The second would be the case of *Sofroniou v. Szgetti* [1991] FCR 332. There the court was concerned with the issue in regard to the validity of the service of the order without the penal notice. It was argued, that the alleged contemnor had, at all material times, notice of the terms of the order not by telephone or telegram but "otherwise" namely by service of the order which despite the absence of the penal notice did contain the terms of the order.

Proceeding further, I must say that the case of *Allport Alfred James v. Wong Soon Lan* [1989] 1 CLJ 271; [1989] 2 CLJ (Rep) 852, is of no assistance to the plaintiff at all. There, the application for an order of committal against the respondent was not allowed because the order which was served on the respondent was not indorsed with the penal notice required under the law.

All said and done, the facts speak for themselves. Factually speaking, the second and the third defendants were not served with a copy of the *ex parte* injunction order until after the publication of the first article. Neither were they present when the *ex parte* injunction order was made nor were they notified of the terms of the said order whether by telephone, telegram or otherwise. That being the case, in my judgment the notice of motion in encl. 36 against the second and the third defendants should fail in respect of the first article.

The Plaintiff's Reliance On The Malay Mail Article Dated 4 December 2003 Particularly In Reference To What Periasamy a/l Munisamy, The Manager Of Malaysia Nanban, Purported To Have Said

The plaintiff has sought to rely on an article in the Malay Mail dated 4 December 2003 as "fortifying the position that the first defendant and all their directors had due notice and full knowledge of the *ex parte* injunction order at the time that the first article and the second article were published on 3 December 2003 and 4 December 2003 respectively."

What Periasamy a/l Munisamy, the manager of Malaysia Nanban, purported to have said in the Malay Mail was misconstrued by the plaintiff. The manager has categorically denied the plaintiff's interpretation of the Malay Mail article that the phrase "we heard it was coming" was in reference to the *ex parte* injunction and he has explained it clearly in his affidavit that was affirmed on 19 January 2004 as reflected in encl. 28. This was what he said in encl. 28:

> 6. In particular, I crave to refer to paragraph 13 of the Plaintiff's Affidavit and deny that the averment stated therein is set out in the proper context of the report in Malay Mail and further contend the same is misconceived by the Plaintiff. I wish to clarify the same as follows:

6.1 Prior to that, there were rumours that the plaintiff was initiating a civil suit against the First Respondent. There was also a talk that the plaintiff would be seeking an injunctive order against the Respondents to stifle criticisms against him as an elected leader of the Indian Community and the President of the party representing the Indian community and the sole representative of the Indian community in the Cabinet of Ministers.

6.2 In consequence thereof, I am aware that the Respondents had instructed their previous solicitors Messrs S. Kandasami & Co to oppose any *ex parte* applications as it would stifle the 1st Respondent from carrying out its moral, legal and social duties to publish article pertaining to social and economic interest of the Indian community.

6.3 I was advised by the Respondents previous solicitors which advise I believe to be true that they had confirmed a suit had been filed *vide* Civil Suit No. 23-72-2003 at the High Court registry through Messrs Shook Lin & Bok. Upon understanding that, the Respondents previous Solicitors immediately served a notice by fax and post the Plaintiff's previous Solicitors setting out the Respondents' intention to oppose the *ex parte* application and that any such application should be heard *inter parte*. Accordingly a copy of the said letter was also faxed and hand delivered to the High Court Registry and was duly acknowledged. I am now shown and it is annexed hereto a copy of the letter issued to the plaintiff's previous solicitors and copied to the High Court Registry opposing any *ex parte* Application as aforementioned and marked as exhibit 'PM-1'.

6.4 The rumours about the application for injunction became stronger ever since the Plaintiff returned from overseas. In view of the Respondents' aforesaid notice, we were of the opinion that the Respondents would be served with a copy of the Application for an Injunction by the Plaintiff and not the injunctive Order.

6.5 Hence I informed the interviewer from Malay Mail that 'we heard about it last Monday, we heard it was coming' and what I had clearly meant was the Application for an Injunction. The emphasis 'injunction' in the relevant paragraph of the publication in the Malay Mail was of their own and cannot be attributed to my statement or meaning of my statement.

6.6 The plaintiff's previous solicitors however later informed the Respondents' previous solicitors that they did not receive the said letter *via* fax nor post. I am now shown and it is annexed hereto a copy of the letter issued by the Respondents' previous solicitors to the plaintiff's previous solicitors and their reply thereto and cumulatively marked as exhibit 'PM-2'."

It is quite conceivable from the averments of Periasamy a/l Munisamy as reproduced above that the defendants had heard of the suit filed through Messrs Shook Lin & Bok and the possibilities of the plaintiff applying for an injunction. The letter dated 22 November 2003 exhibited as exh. "PM1" of Periasamy's affidavit in encl. 28 fortifies the position further and that letter was worded in this way:

Date: 22/11/2003

RE: KUALA LUMPUR HIGH COURT CIVIL SUIT BY DATO SERI S. SAMY VELLU AGAINST PENERBITAN SAHABAT MALAYSIA & ATHI KUMANAN

We act for Penerbitan Malaysia Sdn. Bhd. and Mr. Kumanapupathi a/l Athimuloom also known as Athi Kumanan.

We are instructed by our clients that you have filed civil suit against our clients

We write to state that we have instructions to accept service of the writ on behalf of our clients. Accordingly please effect service on us as solicitors for our clients.

We have been further instructed to put you on notice that should you intend to apply for an interlocutory order including by way of injunction that you notify us of the same. We invoke the doctrine of opposed ex parte and the case of law in respect thereto. Accordingly this letter is being copied to the Registry by notification thereof.

Thank you.

It is crystal clear that the explanations advanced by Periasamy in his affidavit in encl. 28 cannot be described as a mere bare denial as what the plaintiff wanted this court to believe. Moreover, the plaintiff has not contradicted Periasamy's explanations through affidavit evidence and therefore his averments in his affidavit in encl. 28 remains unchallenged.

Order 45 of the RHC envisages personal service on the person against whom the order for committal is sought or personal knowledge of the person of the order by either being present when the order was made or being notified of the terms of the order. There are authorities supporting this proposition of the law. Yet the plaintiff has the audacity to come to an unjustifiable conclusion that the first defendant had due notice and full knowledge of the *ex parte* injunction order at the time the first article was published on 3 December 2003 purely based on the speculative statement made by a third party in complete disregard to the established rules and principles of law (*Kesatuan Pekerja-Pekerja Perusahaan Dunlop Malaysia v. Md Jaafar bin Abdul Carrim & Anor* [1998] 1 CLJ Supp 454).

In my judgment, there must be sufficient ground or evidence before the court could come to the conclusion that the alleged contemnors had knowledge of the terms of the *ex parte* injunction order. The courts will be reluctant to exercise their contempt powers and will only do so in the clearest of cases. For instance an offender, having had proper notice of the order of the court, has been shown by the applicant beyond all reasonable doubt to have committed the contempt.

It is a correct assertion of the law to say that the defendants must have proper notice of the terms of the *ex parte* injunction order. It is an established principle, since time immemorial, that a "person cannot be held guilty of contempt in infringing an order of the court of which he knows nothing" (per Lyell J in *Husson v. Husson* [1962] 3 All ER 1056, [1962] 1 WLR 1434).

At this juncture, it would be ideal to reproduce the write-ups in the Malay Mail dated 4 December 2003 that has been the subject of discontent of the plaintiff (see exh. DSV6 of encl. 22):

Thursday, December 4, 2003

TAMIL DAILY
GOES ENGLISH

By PAULINE ALMEIDA

THE Tamil daily, Malaysian Nanban, stunned its readers yesterday, when its banner headlines – printed in English – read, DEAR PM, PLEASE HELP US!!

The country's top-selling Tamil daily had dumped Tamil to hammer home its appeal to Prime Minister Datuk Seri Abdullah Ahmad Badawi over its campaign to expose the alleged mismanagement of Maika Holdings Berhad.

The sub-heading read Poor Indians – who invested RM106 million in Maika Making their plea to our PM. Another sub-heading read, Datuk Seri – you are our only hope!.

Both the sub-headings were also in English.

The appeal was from disgruntled Maika shareholders, and the Malaysian Nanban had over the last two weeks been highlighting alleged misdeeds in the investment arm of the MIC.

The decision to go English appears to have been made after word had spread yesterday that the MIC president Datuk Seri S. Samy Vellu had obtained an injunction restraining the daily from publishing further articles imputing defamatory allegations against him in relation to, among others, Maika funds (see accompanying report).

At 9.15 last night, the injunction was served on the daily's editorial adviser, Athi Kumanan at the newspaper's officer at 11, Jalan Murai Dua, Batu Complex, at Batu 3, Jalan Ipoh.

The 13 year old Malaysian Nanban is published by Penerbitan Sahabat (M) Sdn Bhd.

Confirming that the injunction was served on Athi, Malaysian Nanban manager M. Periasamy said they had heard about it (injunction) last Monday.

'We heard it was coming,' he said, but declined to state if it was one last attempt by the newspaper to plug the Maika Holdings story before the restraining order was served on it.

He said that the injunction was to have been served on the publication company in the afternoon.

'However, as Athi was not in they said they would come back (to serve the injunction),' he said.

On their unprecedented front page, Periasamy said it was a translation of an open letter to the Prime Minister.

'The Tamil version is featured in page three (also in yesterday's edition).'

When pointed out that the paper appeared to have violated its publishing permit by printing in English, Periasamy said they had not.

'It is only considered a violation, if our paper carried 100 per cent English content.

'But, this was only an appeal to the Prime Minister translated in English.

'Since it is in English, the Prime Minister could understand what the shareholders' grievances were, without someone having to translate for him.'

In the past, Periasamy said, it had carried articles in English and Bahasa Malaysia and the publication did not encounter problems, simply because it did not violate its permit.

The *ex parte* order granted in chambers before High Court Judge Datuk Abdul Wahab Patail on Monday, restrains the publisher, its editorial advisor Kumanapupathi a/l Athimulam @ Athi Kumanan, their agents, servants or otherwise from continuing to publish the allegations in the newspaper or any other publication imputing any of the allegations arising out of daily articles published of Samy Vellu between Nov 11 and Nov 18 in Malaysian Nanban.

Even a Tamil newspaper like Malaysia Nanban can publish news articles in the English language. But, a newspaper report, on its own, does not amount to proof of its contents. Tun Abdul Hamid Omar CJ (Malaya) in *Karpal Singh v. Sultan of Selangor* [1987] 2 CLJ 342; [1987] CLJ (Rep) 686 aptly said:

> Before I consider the grounds, I would, in passing, observe that the sole foundation of the Originating Summons is the statement allegedly made by the Sultan as reported in the New Straits Times and The Star newspapers on July 27, 1987. There is no affidavit before the Court affirmed to by the reporter concerned stating that he heard the Sultan made such statement. The press reports of what the Sultan is reported to have said would appear to be inadmissible as hearsay. The fact that the Sultan has not contradicted the press reports does not, in my view, make the slightest difference for it is well-established that inadmissible evidence does not become admissible by reason of a failure to object.

It is now ideal and appropriate to refer to s. 81 of the Evidence Act 1950 which enacts as follows:

> **81. Presumption as to Gazettes, newspapers, etc.**
>
> The court shall presume the genuineness of every document purporting to be the Gazette, a State Gazette or the London Gazette, or the Government Gazette of any part of the Commonwealth, or to be the Gazette issued by the local Government of any part of the Commonwealth, or to be a newspaper or journal, or to be a copy of a private Act of Parliament printed by Her Britannic Majesty's Printer, and of every document purporting to be a document directed by any law to be kept by any person, if the document is kept substantially in the form required by law and is produced from proper custody.
>
> Explanation – see explanation to section 90.

Apart from the need to refer to cases like *Public Prosecutor v. Neoh Boon Cheong* [1960] 26 MLJ 31, and *Perwira Affin Bank Bhd (dahulunya dikenali sebagai Perwira Habib Bank Malaysia Bhd) v. Lorrain Esme Osman* [1996] 4 MLJ 656, it is also ideal to refer to the case of *Samont N Balakrishna v. George Fernandez* [1969] 3 SCR 603 where the Supreme Court of India, in style, observed:

> A newspaper report without any further proof of what had actually happened through witnesses is of no value. It is at best a second-hand secondary evidence. It is well-known that reporters collect information and pass it on to the editor who edits the news item and then publishes it. In this process, the truth might get perverted or garbled. Such news items cannot be said to prove themselves although they may be taken into account with other evidence if the other evidence is forcible.

In *Malayan Banking Bhd v. Yeo Sun Tong* [1999] 4 CLJ 425, the High Court rightly held that it cannot take judicial notice of the contents of newspaper articles.

Taken in its correct perspective, the Malay Mail article "is a second-hand secondary evidence" and the weight to be attached to it is certainly negligible.

The Second Article (On 4 December 2003)

All the three defendants clearly had notice of the *ex parte* injunction order dated 1 December 2003 on and by 3 December 2003. But, by 4 December 2003, the writ of summons, the statement of claim, the *ex parte* summons in chambers and its supporting affidavits, in fact, the entire cause papers, had not been served on all three defendants and their solicitors. All these relevant cause papers were only served on 5 December 2003. That being the case, in the interim period, the defendants would not have been aware of the specific terms, phrases and issues that would cause them to be in breach of the *ex parte* injunction order dated 1 December 2003.

It is the submission of the learned counsel for the defendants that the first defendant's publication of the second article on 4 December 2003 was merely by way of background information to the plaintiff's action filed against the first and the second defendants and the *ex parte* injunction order that was obtained by the plaintiff on 1 December 2003. Sikandar Batcha bin Abdul Majeed affirmed an affidavit in encl. 31 styled as the first defendant's first affidavit in reply and at para. 13 thereto he deposed as follows:

> 13. I crave leave of the Court to refer to paragraphs 20, 21, 22 and 23 of the Affidavit and deny that the contents of the news published (on) 4-12-2003 were in breach of the said Order. The publication only sought to set out the relevant background and facts giving rise to the Plaintiff's suit and *ex parte* injunction dated 1.12.2003 without intending to breach the terms of the order in any manner whatsoever. The reporters carefully wrote the news and all care had been taken in order not to breach the terms of the Order as set out therein. In respect to this I wish to state that the Order was clear in its terms (in) that it was in respect of the (publication of articles) in Malaysia Nanban Daily on 11.11.2003 and 18.11.2003 only. As at the date of the publication of the 4.12.2003, the Writ and Statement of Claim of the Plaintiff had not been served on any one of the parties herein to be put on notice on the exact words complained of. I am now shown and it is annexed hereto a copy of a accurate translation of the said 4.12.2003 article marked as Exhibit 'SB-1'.

Now, exh. "SB1" of encl. 31 contains the second article in the Malay language as well as in the English language. I have reproduced the English language version of the second article and it is now appropriate for me to reproduce the Malay language version of the second article as reflected in exh. "SB1" of encl. 31 and I shall do so forthwith:

Perkara yang berkenaan pelaburan sebanyak RM 100 juta dalam Maika Holdings Berhad oleh 66 juta kaum India miskin.

Injunksi Mahkamah Oleh Samy Vellu terhadap Malaysia Nanban.

Kuala Lumpur 4 Disember,

Presiden MIC Dato Seri Samy Vellu telah mendapatkan perintah injunksi *ex parte* untuk melarang akhbar Tamil Harian Malaysia Nanban dan Athi Kumanan daripada menulis melibatkannya mengenai perkara-perkara yang berhubungan dengan pelaburan sebanyak RM 100 juta dalam Maika Holdings oleh 66,000 juta kaum India miskin.

Pemegang-pemegang saham dalam Maika memberitahu bahawa mereka telah menjual kambing, lembu dan telah menggadai barangan kemas dan mengambil wang simpanan mereka untuk melabur dalam Maika. 'Apa yang telah terjadi pada wang tersebut' tanya pemegang-pemegang saham dari seluruh negara dan akhbar Malaysia Nanban telah menerbitkan tentang kisah-kisah kesedihan dan kepiluan mereka.

Presiden Kebangsaan IPF Dato M.G. Pandithan bertanya apa yang telah terjadi kepada RM7.5 juta yang dikutip olehnya dan apa yang berlaku pada wang pelaburan dalam Maika, apakah sebabnya keadaan Maika sekarang, apakah jawapan anda kepada pemegang syer yang bimbang? Kesemua ini telah disiarkan dalam akhbar Malaysia Nanban.

Selepas kenyataan Dato Pandithan, rayuan dan permohonan kepadanya untuk keadilan oleh masyarakat dari seluruh negara turut disiarkan.

Berita mengenai pergulungan Maika dan penggunaan wang sebanyak RM RM1,42,731 oleh Vel Paari anak kepada Dato Seri Samy Vellu dan seorang lagi bernama Sanjay Baradhwaj yang dipercayai adalah warganegara asing menggunakan kad kredit juga disiarkan.

Pemegang-pemegang saham dari seluruh negara sedang menceritakan kisah kesedihan mereka. Perasaan kekecewaan yang diluahkan oleh mereka kerana tidak mendapat sebarang jawapan walaupun rayuan untuk penjelasan untuk wang simpanan dari hasil titik peluh mereka juga disiarkan.

Orang Tua Dalam Tangisan

Akhbar Harian Nanban juga menerbitkan berita dengan gambar seorang India tua yang berusia 72 tahun merayu supaya RM 5,000.00 dipulangkan untuk pulang ke India sebelum mati. Mereka yang melabur dalam Maika adalah dari beberapa parti yang berlainan di negara ini. Mereka sedang menceritakan kisah kesedihan setiap hari.

Sementara itu terdapat juga berita diterbitkan mengenai 66,000 India yang melabur dalam Maika dengan penuh kepercayaan terhadap Dato Seri S. Samy Vellu yang memberitahu bahawa beliau akan menaikkan taraf masyarakat dan meningkatkan ekonomi golongan India daripada 1% kepada 7% menyoal beliau apa yang telah jadi kepada pelaburan mereka.

Dalam situasi ini Dato S. Seri Samy Vellu telah mendapat perintah untuk menahan Malaysia Nanban dan Athi Kumanan daripada menulis apa-apa tentang beliau. Perbicaraan injunksi ini akan diadakan pada 19 Disember.

Tentangan Terhadap Injunksi
Malaysia Nanban akan mengambil tindakan yang sepatutnya.

Kuala Lumpur, 4 Disember.

Malaysia Nanban akan mengambil tindakan guaman yang sepatutnya terhadap injunksi mahkamah yang diperolehi oleh Samy Vellu yang menyatakan bahawa, dalam isu MAIKA, yang berkaitan dengan 66 ribu orang pemegang syer, tidak ada apa-apa yang harus ditulis tentang beliau.

Athi Kumanan yang memberikan pandangan beliau tentang injunksi ex parte yang diperoleh oleh Samy Vellu ini mengumumkan bahawa beliau telah meminta peguam beliau untuk mengambil tindakan selanjutnya.

I too have reproduced the ex parte injunction order dated 1 December 2003 in the early part of this judgment and I do not propose to repeat them here. Suffice for me to say that the terms of the *ex parte* injunction order when compared between the Malay language version with the English language are unclear and ambiguous. The plaintiff says that the said order is unambiguous whereas the defendants hold the opposite view. In my judgment, the said order drafted in both languages are both unclear and ambiguous. I have in the early part of this judgment referred to the case of *Iberian Trust, Limited v. Founders Trust And Investment Company, Limited (supra)* in the context of an ambiguous order and there the court was concerned with an order which stated "that the plaintiffs do have the return of the said shares within fourteen days". It was the allegation of the plaintiffs there that the defendant company was in breach of the order and had committed contempt. Luxmoore J, rejected this contention. His Lordship was of the view that the order was ambiguous and his Lordship

also refused to interpret the order to mean that the defendant company had been ordered to do something. His Lordship was of the view that the order did not specify exactly that the defendant company was to return the shares.

Another interesting case would be that of *PA Thomas & Co v. Mould* [1968] 2 QB 913, [1968] 1 All ER 963. There the plaintiffs were a company specialising in finance. It instituted an action against the defendants who had during the course of their employment with the plaintiffs acquired the "know-how" of purportedly four novel financial schemes. These schemes were said to be the brain-child of the plaintiffs. In due course, the plaintiffs obtained an interim injunction restraining the defendants from, *inter alia*:

> disclosing, divulging or making use of any confidential information acquired by them during the course of their employment by the plaintiffs or from any person who acquired such information in the course of his employment by the plaintiffs relating to (a) schemes providing for the sale of income; (b) schemes providing for splitting an endowment; (c) schemes concerned with death in service …

The defendants prepared their defence and in the course of which they wrote to other competitors in the field in order to enquire whether the schemes initiated by the plaintiffs were indeed novel. The plaintiffs were furious because these enquiries proceeded to reveal confidential materials belonging to the plaintiffs and so it was said that these enquiries had breached the interim injunction order. The plaintiffs failed to succeed simply because the exact nature of the schemes had not been explicitly mentioned in the interim injunction order. O'Connor J refused to infer that a breach had taken place and this was what his Lordship said (see p. 922 of the Queens Bench reporting and p. 967 of the All England reporting):

> ... if the plaintiffs, seeking to protect their 'know-how', are anxious to enforce any injunction which may be granted to them by seeking the help of the court to punish a breach of it, it seems to me to be quite essential that they should make it absolutely clear what it is they are seeking to protect.

These two cases emphasised the importance of certainty and sureness in an order. Of course it goes without saying that observance of the *ex parte* injunction order dated 1.12.2003 is required until it is set aside. It is because of this that this matter is now before me. Diligence must be exercised in observing the said order (*Harding v. Tingey* [1864] 12 WR 684). According to the defendants they have exercised due diligence.

The learned counsel for the defendants painstakingly explained the contents of the second article. I must be forgiven for reproducing what the learned counsel had said.

In regard to the first paragraph in the second article that reads:

> MIC's President Dato Seri Samy Vellu has got an *ex parte* court injunction against Nanban newspaper and Mr. Athi Kumanan saying that nothing should be written about him related to the issue of MAICA Holdings in which 66 poor Indians had invested RM100 million.

the learned counsel for the defendants explained that it merely talks about the said order only. I really wonder whether they are indeed poor Indians. Calculation-wise it takes one Indian to contribute RM1,515,152 individually before all the 66 Indians could together contribute RM100 million. In fact, each Indian is a millionaire and not as poor as a church mouse.

It must be pointed out that the heading of the second article refers to "66 Thousand Poor Indians" whereas the first paragraph of the second article makes reference to "66 poor Indians". I too wonder which of the two versions should this court rely upon.

In regard to the next paragraph of the second article which reads:

> It is a known knowledge that Malaysia Nanban has been publishing the tear stricken stories and raging fury in the hearts of the nationwide shareholders who say, 'Selling our cattle, pawning our jewellery and by bringing all our life's savings we bought shares in MAICA. What has happened to the money?"

the learned counsel for the defendants explained that this paragraph merely sets out the past events and it relates to Maika only and that it does not refer to the plaintiff at all.

Then there is this paragraph in the second article that reads:

> National leader of the IPF Party Datuk MG Pandithan who had collected RM7.5 million was raising questions such as what happened to the money he had given? What is the cause of the current status of MAICA? What is your response to the shareholders who are agonised by giving money? Nanban newspaper was publishing these questions.

and the learned counsel points out that this paragraph merely sets out the past events in MAIKA and it talks about Datuk M.G. Pandithan. It does not refer to the plaintiff at all.

Another paragraph of the second article reads as follows:

> News such as following the statement released by Datuk Pandithan nationwide shareholders aired their grievances and requesting him to get justice, was also published.

and the learned counsel submits that this paragraph sets out the past events and it is in respect of MAIKA and Datuk Pandithan only. It does not, according to the learned counsel, refer to the plaintiff.

The next paragraph of the second article reads as follows:

> News such as the case filed to close down MAICA (Case of Closing Ceremony) and MAICA money RM1,42,731 spent by Samy Vellu's son Vel Paari and Baradhwaj, a person known to be a foreigner to pay for their credit cards was also published. Shareholders nationwide are coming in good strength and keep on sharing their tear filled stories. Their heart wrenching anguish saying that they are left helpless without an answer in spite of them begging asking for their investment of the money saved through labouring hard all their lives, was also vividly portrayed by the people's magazine Malaysia Nanban.

and, in response thereto, the learned counsel submits that this paragraph sets out the past events and it is in respect of MAIKA and Vel Paari (who is said to be the CEO of MAIKA). The learned counsel also emphasised that it does not refer to the plaintiff and that reference to Vel Paari as the son of the plaintiff was purely incidental and that the said paragraph does not implicate the plaintiff in any way. It is also submitted by the learned counsel that the *ex parte* injunction order is specific in its terms in that the defendants should refrain from imputing any of the matters as set out in the said order concerning the plaintiff only. It is further submitted that the said order does not restrain the defendants from publishing any news concerning any members of the plaintiff's family.

The second article continues as follows:

> Tears of an old man
>
> The scene of a 72 year old man standing with tears and sorrow saying, 'Return my money RM5,000 I invested at least before my body goes to pyre in India', was published with photograph. Among those shareholders invested in MAICA, there are people from all political parties of our nation. All of them are narrating their hurting stories.

And the learned counsel points out that this paragraph merely sets out the past events and it is solely in respect of MAIKA only. It is submitted that this paragraph does not refer to the plaintiff at all.

This is followed by the next paragraph of the second article which reads as follows:

> In this situation, on behalf of the 66 thousand shareholders asking what will happen to the money we invested trusting Samy Vellu's words saying that he will raise the community in economy and will raise equity of Indians from 1% to 7%, was published.

According to the learned counsel, this is the only paragraph that makes reference to the plaintiff in relation to MAIKA. But it is submitted that it is not contemptuous nor does it offend any of the terms of the said order.

Another paragraph in the second article reads as follows:

> In this state of affairs, Dato' Seri Samy Vellu has an injunction against the management of Malaysia Nanban and Mr. Athi Kumanan saying that nothing should be written about him. The inquiry on this injunction will take place on 19 December.

and it is submitted that this paragraph talks about the said order only.

Finally, the last paragraph in the second article reads as follows:

> Against the Injunction
>
> Malaysia Nanban will take appropriate action.
>
> Kuala Lumpur, Dec 4.
>
> Malaysia Nanban will soon take appropriate legal action against the court injunction obtained by Samy Vellu saying, that in the MAICA issue, which is related to the 66 thousand shareholders, nothing should be written about him.
>
> Athi Kumanan who gave his views on this Ex-Parte injunction obtained by Samy Vellu announced that he has asked his lawyers to take up further action.

and the learned counsel points out that it is evident that the second article clearly refers to the said order obtained by the plaintiff and its previous publications relating to MAIKA issues only without imputing any of the matters as set out in Appendix "A" and Appendix "B" annexed to the said order in relation to MAIKA.

Only one paragraph in the second article, as alluded to earlier, makes reference to the plaintiff and that too cannot be said to be contemptuous. I am not prepared to hold the defendants for contempt in regard to the second article. The terms of the *ex parte* injunction order have not been breached at all. In my judgment, the "dignity of the court" (to borrow the words of an English judge which is referred to hereinafter) has not been offended by the publication of the second article.

It is inaccurate and misleading when one uses the phrase "contempt of court". It is a phrase that is difficult to define (see the speeches of Lord Cross in *A.G. v. Times Newspapers Ltd* [1974] AC 273 at 315; and Salmon LJ in *Jennison v. Baker* [1972] 2 QB 52 at 61). In *Johnson v. Grant* [1923] SC 789 at 790, Lord President Clyde aptly said:

> The phrase 'contempt of court' does not in the least describe the true nature of the class of offence with which we are here concerned … . The offence consists in interfering with the administration of the law; in impeding and perverting the course of justice … . It is not the dignity of the Court which is offended … a petty and misleading view of the issues involved – it is the fundamental supremacy of the law which is challenged.

It is a necessary evil to have the law of contempt. Article 126 of the Federal Constitution states as follows:

> The Federal Court, the Court of Appeal or a High Court shall have power to punish any contempt of itself.

And this is repeated in s. 13 of the Courts of Judicature Act 1964. Even the subordinate courts are empowered to punish anyone for contempt and this is set out in s. 99A of the Subordinate Courts Act 1948 to be read with s. 9 of the Third Schedule thereto. But many areas are still unchartered. There is no specific statute in Malaysia covering the definition of contempt. Neither is there any specific statute in Malaysia covering the following areas:

(1) the offences of contempt;

(2) the procedure that has to be adopted;

(3) what are the defences available; and

(4) what type of sentences to be meted out for the varied offences of contempt.

It is time that the Attorney-General chambers do something about it. In the meantime, we have to follow the common law. And this seems to be the approach adopted by the Supreme Court in *Attorney-General, Malaysia v. Manjeet Singh Dhillon* [1991] 1 CLJ 216; [1991] 1 CLJ (Rep) 22. Even the Court of Appeal follows suit in *Murray Hiebert v. Chandra Sri Ram* [1999] 4 CLJ 65.

Procedure wise, as far as civil contempt is concerned it is found in O. 52 of the RHC and O. 34 of the Subordinate Courts Rules 1980. What is uncertain is in the area of criminal contempt.

To be fair, a new procedure has recently been introduced to cover the offence of contempt in the face of the court. And this is part and parcel of criminal contempt and it is found in the new r. 1A of O. 52 of the RHC. In regard to all the other forms of contempt, a new r. 1B to O. 52 of the RHC has been added and it reads as follows:

> In all other cases of contempt of court, formal notice to show cause why he should not be committed to the prison or fined shall be served personally.

Lord Diplock in *Attorney-General v. Times Newspaper Ltd* [1973] 3 All ER 54 at 71 stressed the need to have the right system of adjudicating disputes and dispensing justice. This was what he said (see p. 71):

> … in any civilised society it is the function of government to maintain courts of law to which its citizens can have access for the impartial decision of disputes as to their legal rights and obligations towards one another individually and towards the state as representing society as a whole. The provision of such a system for the administration of justice by the courts of law and the maintenance of public confidence in it are essential if citizens are to live together in peaceful association with one another.

We are fortunate that the government of the day has set up the right system of dispensing justice by the establishment of the courts throughout the country and appointing the right people to man the system.

On the one hand there is this dire need to have the law of contempt while, on the other hand, there is also an urgent need to protect the freedom of expression. It is difficult to strike a balance between these two denominators. It is also difficult to strike a balance between the freedom of expression and the need to maintain public confidence in the judiciary. Indeed Tun Abdul Hamid Omar, the Lord President of the Supreme Court in *Trustees of Leong San Tong Khoo Kongsi (Penang) Registered & Ors v. SM Idris & Anor and Another Application* [1990] 1 CLJ 723; [1990] 1 CLJ (Rep) 293 expressed his concern in these salient words:

> A balance must be struck between the right to freedom of speech as provided for in Article 10 of the Federal Constitution and the need to protect the interest … of maintaining public confidence in the judiciary.

The broad categories of contempt of court may be stated as follows. It would cover such matters like:

(1) disrupting the proceedings of the court and this would be described as contempt in the face of the court;

(2) publications of court proceedings which would tend to interfere with the court proceedings itself;

(3) publications of court proceedings that would scandalise the court;

(4) disobeying court orders; and

(5) failure to fulfill undertakings given to the court.

That sums up the meaning of the phrase "contempt of court". In encl. 36, the plaintiff seeks for an order of committal against the defendants. Must I accede to encl. 36? That is the question of the day. I would answer this question in the negative.

"Freedom of speech and expression" is certainly a very important factor to consider. It is in the public interest that there should be "freedom of speech and expression". In *A.G. v. Times Newspapers Ltd* [1974] AC 273 at 320, Lord Simon had this to say:

> The public interest in freedom of discussion (of which the freedom of the press is one aspect) stems from the requirement that members of a democratic society should be sufficiently informed that they may influence intelligently the decisions which may affect themselves.

The freedom of speech is also demonstrated in the case of *Publications Control Board v. William Heinemann Ltd* [1965] (4) SA 137 at 160E. There Rumpff JA aptly said:

> When a Court of Law is called upon to decide whether liberty should be repressed – in this case the freedom to publish a story – it should be anxious to steer a course as close to the preservation of liberty as possible. It should do so because freedom of speech is a hard-won and precious asset, yet easily lost.

Freedom of speech and expression must be read in the context of the right to information when dealing with the second article. According to *Halsbury's Laws of England*, (1974) 4th edn, vol. 8 at para. 834, the phrase "freedom of expression" would include both the right to receive and to express ideas and information and the secrecy of private communication. There are various forms of expressions. It would include writing articles, books and publishing articles in newspapers (like the case at hand). It would also extend to drafting speeches and uttering them as well as broadcasting them. But the freedom of speech and expression is not an absolute right. It is here that this court is called upon to decide the fate of encl. 36. I must put in the forefront of my mind, the speech of the Court of Appeal of New Zealand in the case of *Gisborne Herald Co Ltd v. Solicitor-General* [1995] 3 NZLR 563, at p. 571:

> The common law of contempt is based on public policy. It requires the balancing of public interest factors. Freedom of the press as a vehicle for comment on public issues is basic to our democratic system. The assurance of a fair trial by an impartial court is essential for the preservation of an effective system of justice. Both values have been affirmed by the Bill of Rights. The public interest in the functioning of the courts invokes both these values.

It must be borne in mind that in Malaysia, we do not have the Bills of Rights Act 1990 like what the New Zealanders have. But we have art. 10(1)(a) of the Federal Constitution.

In *Canadian Newspaper Company v. Canada (Attorney-General)* [1988] 43 CCC (3D) 24, 29, Lamer CJ aptly said:

> Freedom of the press is, indeed, an important and essential attribute of a free and democratic society, and measures which prohibit the media from publishing information deemed of interest obviously restrict that freedom.

In Malaysia, the test to apply as to what would amount to contempt is this:

> … if it is likely or it tends in any way to interfere with the proper administration of justice.

and that would be the test adopted by the Court of Appeal in *Murray Hiebert v. Chandra Sri Ram (supra)*. With due respect, the second article is not likely nor does it tend to interfere, in any way, with the proper administration of justice. This is my judgment and I so hold accordingly.

In the case of *Lim Kit Siang v. Dato' Seri Dr. Mahathir Mohamad* [1987] 1 MLJ 383, the former Prime Minister of Malaysia made some comments during an interview and what he said was reported in an article in the Time magazine under the heading, "I Know How The People Feel". I must be forgiven if I were to reproduce what the former Prime Minister of Malaysia had said (see p. 383 of the report):

> On the Courts. The judiciary says (to us), 'Although you passed a law with a certain thing in mind, we think that your mind is wrong, and we want to give our interpretation.' If we disagree, the courts will say, 'We will interpret your disagreement'. If we go along, we are going to lose our power of legislation. We know exactly what we want to do, but once we do it, it is interpreted in a different way, and we have no means to reinterpret it our way. If we find out that a court always throws us out on its own interpretation, if it interprets contrary to why we made the law, then we will have to find a way of producing a law that will have to be interpreted according to our wish.

The High Court gave credence to the right to freedom of speech and expression and the Supreme Court upheld the decision of the High Court. Harun Hashim J made this observation (see p. 385 between line "F" to line "G" and p. 386 at line "H" left column of the report):

> It is important that the courts should be the subject of free criticism. … The right of every individual (including the Prime Minister) to freedom of speech in this country has been consistently upheld by the courts subject only to any restrictions that are prescribed by the Constitution itself. There is no reason to deny the right to the respondent in the instant case. The court should not be over sensitive to criticism.

Likewise here, freedom of speech and expression should be accorded to the defendants. The plaintiff as well as this court should not be "over sensitive to criticism".

So much for the brief discourse on the law.

I have said that the writ of summons and the statement of claim were not served on the defendants at the time of the service of the said order and before the publication of the second article. It is totally unfair if the plaintiff is permitted to stretch the meaning of the terms of the said order beyond what is stipulated therein. The breach must be proved beyond all reasonable doubt. As Lawton J said in *W. Watson & Sons Ltd v. Garber* [1962] 106 So Jo 631:

> … before the court would exercise its very special jurisdiction to punish for breach of an order, it was essential that proper proof of a breach be given.

The standard of proof is like that of criminal cases: beyond all reasonable doubt (*Northwest Territories Public Service Association v. Comr of the Northwest Territories* [1980] 107 DLR (3d) 458 at 479; *Crown Zellerbach Canada Ltd v. Annand* [1972] 27 DLR (3d) 129; *Canadian Metal Co Ltd v. Canadian Broadcasting Corpn (No: 2)* [1975] 48 DLR (3d) 641 at 660; *Re Sheppard and Sheppard* [1976] 67 DLR (3d) 592 at 594; and *Re Regina and Monette* [1975] 64 DLR (3d) 470 at 473).

Here, on facts, the breach has not been proved beyond all reasonable doubt. In *Re Bramblevale Ltd* [1970] Ch 128 at 137, Lord Denning MR laid down the law in this way:

> A contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved. To use the time-honoured phrase, it must be proved beyond all reasonable doubt. It is not proved by showing that, when the man was asked about it, he told lies. There must be further evidence to incriminate him. Once some evidence is given, then his lies can be thrown into the scale against him. But there must be some other evidence.

That was a case where the defendant, a managing director of a company that was wound up, was brought before Megarry J for his alleged contempt for not complying with an order made by the registrar to produce certain books belonging to the company. The defendant stated that at the time of the order by the registrar, the books had become soaked in petrol and that he had inadvertently thrown them away. His Lordship Megarry J did not believe the story of the defendant and he then committed the defendant indefinitely for contempt. After a month thereafter, the defendant applied to the court for his release and Megarry J said at p. 136 thereto:

> … there are only two possibilities … either he still has them, or else he no longer has them, whether by reason of loss, destruction, transfer to someone else or otherwise …

Megarry J was of the view that the defendant was still at fault since if he still had the books he ought to have handed them over to the court and even if he had destroyed those books he would have been guilty of an offence under the then s. 328 of the Companies Act 1948. By way of a conclusion, Megarry J held that the defendant had "by his own voluntary act has put himself in difficulties, he has only himself to blame", and flowing from that his Lordship then refused to release the defendant. On appeal to the Court of Appeal, the defendant was successful. Lord Denning MR in the Court of Appeal held that although the defendant may have lied through his teeth about the car crash, that in itself did not prove that he had the books in his possession at the time of the order by the registrar. According to Lord Denning MR there were, in fact, two equally likely possibilities. Either that the defendant, at the time of the order by registrar, had the books in his possession and had wrongfully and wilfully refused to deliver those books or if the defendant had disposed of the books he could not therefore deliver them. Lord Denning MR held that for these reasons it was certainly not possible to say which of the two possibilities were correct. In the words of Lord Denning MR:

> The court cannot be satisfied beyond reasonable doubt that he still had the books … . That would be conjecture rather than inference – surmise rather than proof. Where there are two equally consistent possibilities open to the court, it is not right to hold that the offence is proved beyond reasonable doubt.

Likewise, in adjudicating encl. 36, I too cannot conjecture against the defendants. I must reiterate that the standard of proof required in contempt of court proceedings is beyond all reasonable doubt and where there is doubt, that doubt ought to be resolved in favour of the alleged contemnors. In this case, the alleged contemnors are the defendants (*Wee Choo Keong v. MBF Holdings Bhd & Anor and Another Appeal* [1995] 3 MLJ 549, CA; and *Chandra Sri Ram v. Murray Hiebert* [1997] 3 CLJ Supp 518, the decision of

Low Hop Bing J). In *Lee Lim Huat v. Yusuf Khan bin Ghows Khan & Anor* [1997] 3 CLJ 197, the Court of Appeal categorically held that the evidence when considered in its totality has to establish beyond reasonable doubt the guilt of the contemnor.

In my judgment, the second article dated 4 December 2003 attempts to report that the plaintiff has taken out an injunction against the first and the second defendants and that the first and the second defendants would be seeking legal advice and contesting the matter in court. It cannot be denied that the second article dated 4 December 2003 referred to Maika Holdings but this was more by way of a "general background" so as to give the full perspective as to why the plaintiff was seeking an injunction.

It is the stand of the plaintiff that the second defendant is the editor of Malaysia Nanban and he is *prima facie* liable for taking part in publishing the two articles dated 3 December 2003 and 4 December 2003 respectively. The plaintiff even went to the extent of stating that the second defendant did not deny this in his affidavit dated 16 January 2004 as seen in encl. 26. This is totally incorrect. The second defendant, at all material times, has been the editorial adviser to the Malaysia Nanban. At no time did the second defendant advise, edit or write the two articles dated 3 December 2003 and 4 December 2003. It is the editorial staff of the Malaysia Nanban that is responsible for the publication of both the articles dated 3 December 2003 and 4 December 2003. In encl. 26, the second defendant deposed as follows:

1. I am the editorial advisor of the Malaysia Nanban. Malaysia Nanban is a Tamil newspaper published and circulated daily in Malaysia. The First Respondent is the publisher of Malaysia Nanban.

2. I am the 2nd Respondent herein.

3. The facts deposed to herein are true and are from my personal knowledge and or from documents that are within the Defendants' possession and control the contents of which I believe to be true and accurate to the best of my knowledge and belief. In so far as my knowledge is based on information and belief, the source of that information and belief will be disclosed in this Affidavit.

4. I seek leave to refer to the following cause papers filed in this action:

   a. Plaintiff's Notice of Motion filed herein.

   b. Plaintiff's Affidavit in Support affirmed by the Plaintiff on 30.12.2003 ('Plaintiff's Affidavit').

c. Statement Pursuant to Order 52 Rule 2 (2) of the Rules of the High Court 1980.

d. Order dated 1.12.2003 ('the Order').

5. I affirm this affidavit in opposition to the Plaintiff's application for leave to apply for an order of committal against the Respondents named herein through the Notice of Motion and in answer to the Plaintiff's Affidavit thereof.

6. I crave leave to refer to paragraph 5 of the Plaintiff's Affidavit. I refute the Plaintiff's allegation that I am the editor of Malaysia Nanban and that I 'write extensively' in the Malaysia Nanban. I reiterate that I am an editorial advisor of Malaysia Nanban and that I contribute articles that are published in Malaysia Nanban. I generally write on matters that have bearing on the social, economical and political welfare of the Indian community. The 1st Defendant however is not obliged to publish my writings and neither can I compel the 1st Defendant to publish my writings.

7. I do not deny paragraph 6 of the Plaintiff's Affidavit.

8. I crave leave to refer to paragraph 7 of the Plaintiff's Affidavit. I deny any knowledge of the alleged conspiracy to injure the Plaintiff's reputation as alleged. In so far as the Plaintiff's claim for the tort of conspiracy to injure is concerned I am advised by my solicitors and verily believe that the same is misconceived in law and wholly unsustainable. My solicitors will refer to and rely on the Defence dated 2.1.2004 and filed herein for its full effect.

9. I do not deny paragraphs 8, 9 and 10 of the Plaintiff's Affidavit in respect of the terms of the order save that the injunction applied for and obtained are in respect of publication on 11.11.2003 and 18.11.2003 only as shown in the Plaintiff's Affidavit in exhibits 'DVS-2' and 'DVS-3'. I am verily advised that the Plaintiff has made no application to the court to amend the said order in respect of any other publications in Malaysia Nanban.

10. I crave leave of the court to refer to paragraph 11 of the Plaintiff's Affidavit and I do not deny the contents therein. However I wish to add that the purported service on the registered address of the 1st Respondent was outside the normal working hours of the office concerned. I am advised by my solicitors which I verily believe to be true that the company secretary of the 1st Respondent has affirmed an affidavit on the purported service of the Order on the 1st Respondent.

11. I refer to paragraph 12 of the Plaintiff's Affidavit and state that the 3rd Respondent has affirmed an affidavit with regard to the service on him. As far as the averment in respect of the service of the Order on me, I deny that the order was served on 3.12.2003 at 9.00 a.m. I reiterate that the Order was only served on me at about 9.15 p.m. on 3.12.2003 as shown in the Plaintiff's Affidavit exhibit 'DVS-5'.

12. I refer to paragraph 13 of the Plaintiff's Affidavit and deny that the averment stated therein is set out in the proper context of the report in Malay Mail.

13. I crave leave of the court to refer to paragraph 14 of the Plaintiff's Affidavit and wish to clarify the contents therein as follows:

13.1 The Plaintiff's letter for the purported service on the 1st Respondent's registered address referred to in paragraph 31 of my Affidavit affirmed on 30.12.2003 should read as 2.12.2003 instead of 1.12.2003 as confirmed in the Plaintiff's own affidavit in exhibit 'DSV-4'.

13.2 As for the reference that the Plaintiff's letter being addressed to Noruthen bin Sikandar Batcha, I wish to clarify that a copy of the said letter was shown to me on 3.12.2003 with the information (that) the said order had been served on the company secretary of the First Respondent on 2.12.2003 and informed to Sikandar Batcha Bin Abdul Majeed on 3.12.2003. I requested for a copy thereof which was obliged and was produced as exhibit 'AK-12' in my affidavit affirmed on 30.12.2003.

13.3 Insofar (as) the dates mentioned herein are inconsistent with the dates referred to in my Affidavit affirmed on the 30.12.2003, I wish to state that the reference to the respective dates stated herein are correct to the best of my knowledge and I wish to clarify that the inconsistency was due to Typographic errors in my earlier Affidavit which I propose to correct by virtue of this Affidavit.

14. I refer to paragraph 15 of the Plaintiff's Affidavit and vehemently deny that the Respondents had any knowledge of the said Order prior to the publications of the 3.12.2003 article and reiterate that the order was brought to the knowledge of the relevant parties only on 3.12.2003 i.e. after the publication and circulation of the 3.12.2003 article which was printed on 2.12.2003 at about 9.00 p.m. In this respect I wish to further add that the Plaintiff had afforded no explanation whatsoever for the said service on the registered address of the 1st Respondent which only was effected after normal working hours of an office. Further, the Plaintiff nor his solicitors made any attempt to bring the said order to the attention of the publication office of Malaysia Nanban in order to protect the objective of the order obtained pursuant to a certificate of urgency.

15. I crave leave of the court to refer to paragraphs 16 to 23 of the Plaintiff's Affidavit and wish to refer to the Affidavit of Sikandar Batcha Bin Abdul Majeed affirmed on 16.1.2004 and filed herein on behalf of the 1st Respondent in reply to the above mentioned paragraphs of the Plaintiff's Affidavit and adopt the same.

16. In any event I reiterate that I did not write nor cause the publication of the said articles mentioned in paragraphs 16 to 23 of the Plaintiff's Affidavit. I did not write any article nor advised the editorial staff in the publication of the said articles or any other articles concerning the Plaintiff in 'Malaysia Nanban' after due service of the said Order. Neither did I aid or abet the 1st Respondent in breaching the said Order. On the above premise paragraphs 24 and 25 of the Plaintiff's Affidavit is denied.

17. However if this Honourable Court deems that I had the requisite knowledge of the said Order prior to the publication of the article dated 3.12.2003 for any reason whatsoever and that I am responsible for the said publication for any reason whatsoever and that the publication dated 4.12.2003 is in effect in breach of the terms of the Order and similarly I am responsible for the said second publication for any reason whatsoever I wish to tender my humble and unreserved apologies to this Honourable Court for same. I am aware of the seriousness and solemnity of court injunctions and I stand before this Honourable Court to offer my sincerest apologies and wish to state that I fully intend to comply with the terms of the injunction in future.

18. Wherefore the Defendants respectfully pray that the Plaintiff's application for leave for an order for committal be dismissed with costs.

Periasamy a/l Munisamy, the manager of the Malaysia Nanban affirmed an affidavit on 27 January 2004 as seen in encl. 34 and there he averred to the following facts:

(1) that the second defendant – referring to Kumana Pupathi a/l Atimulam @ Athi Kumanan, is merely an editorial advisor of the first defendant;

(2) that the actual editor of the first defendant is another individual by the name of Rajintheram a/l Muthiah; and

(3) that the permit application under s. 6(1)(a) of the Printing Presses Publications Act 1984 is exhibited as exh. PM4 to encl. 34 and at p. 3 thereof Rajintheram a/l Muthiah is declared as the editor of Malaysia Nanban.

These material averments had not been denied nor refuted by the plaintiff (*Sunrise Sdn Bhd v. First Profile (M) Sdn Bhd & Anor* [1996] 3 MLJ 533, FC; *Alloy Automotive Sdn. Bhd. v. Perusahaan Ironfield Sdn. Bhd.* [1986] 1 MLJ 382, SC; and *Siow Yoon Keong v. H Rosen Engineering BV* [2003] 4 MLJ 569, CA) and they must be construed to have been admitted (*Dawkins v. Prince Edward of Saxe Weimar* (1875-76) 1 QBD 499). Now, since the second defendant was not the editor of Malaysia Nanban at the material time he cannot be said to have been in breach of the *ex parte* injunction order dated 1 December 2003. The plaintiff relies on the case of *Abdul Khalid Bakar Shah v. Party Islam Se Malaysia (PAS) & Ors* [2001] 4 CLJ 15 in order to drive home the argument that the second defendant has "considerable say on the content of the article" (see p. 31 g of the report). That argument can never be applied to the second defendant here because he is not the editor of Malaysia Nanban whereas the second defendant in *Abdul Khalid Bakar Shah (supra)* was. Even the fifth defendant in *Abdul Khalid Bakar Shah (supra)* was the English editor.

The editor of a newspaper is a powerful individual. He is responsible for publication and he has the ultimate control over the contents of the newspaper (*R v. David Syme & Co Ltd* [1982] VR 173 at 178). In the words of Lord Goddard CJ in *R v. Odhams Press Ltd, ex p A.G.* [1957] 1 QB 73 at 80:

> It has always been a tradition of English journalism that the editor takes responsibility for what is published in his paper and this was held to be a rule of law in *R v. Evening Standard Co Ltd, ex p A.G.* [1954] 1 QB 578, [1954] 1 All ER 1026.

Re O'Connor, Chesshire v. Strauss [1896] 12 TLR 291, is a classic case to show that an editor must be held responsible for what has been published. There, the editor of a newspaper known as the Sun was shown a very short version of a proposed article. It was done in a rush. The editor was about to go on a trip and so he hardly had time to read the proposed article. The editor warned his sub-editor to be very careful. But despite that warning, the sub-editor went ahead to publish the proposed article and this was done without the editor's knowledge. The proposed article was held to amount to contempt. The court held the editor to be liable.

The editor in *R v. Evening Standard Co Ltd* [1954] 1 QB 578, [1954] 1 All ER 1026 was held to have been in contempt for publishing a misreport of a case based on an inaccurate information as supplied by a reporter notwithstanding the fact that it was acknowledged that the editor had every reason to believe that the information was accurate.

Again, the editor of the newspaper known as the Times was held responsible in *R v. Thomson Newspapers, ex p A.G.* [1968] 1 All ER 268, [1968] 1 WLR 1 for a prejudicial publication notwithstanding the fact that he was very careful and had devised a system to "prevent this sort of thing" from happening.

In my judgment, the second defendant cannot be held accountable and he was not in breach of the *ex parte* injunction order dated 1 December 2003. The net result would be this. That the second defendant was not involved, at any material time, in the publication, writing or editing of the first article dated 3 December 2003 and the second article dated 4 December 2003.

Conclusion

By way of a conclusion and reiteration, I would accordingly dismiss encl. 36 – the notice of motion, filed by the plaintiff as the applicant with costs for the following reasons:

(1) That the notice of motion in encl. 36 seeks to commit the defendants for contempt of news articles published in the newspaper Malaysia Nanban between 11 November 2003 to 30 November 2003 concerning the plaintiff but the two impugned articles referred to in encl. 22 in exhs. DSV7 and DSV8 are dated 3 December 2003 and 4 December 2003 respectively.

(2) That the notice of motion in encl. 36 is related to the *ex parte* injunction order dated 1 December 2003. There are two versions of the *ex parte* injunction order as per encl. 9. One in the Malay language and the other in the English language. According to the Malay language version, the key words would be "pada tarikh 11 November 2003 dan 18 November 2003" which refer to the articles published in the Malaysia Nanban on 11 November 2003 and 18 November 2003 and not the articles published daily between 11 November 2003 and 18 November 2003 as stated in the English language version of the *ex parte* injunction order in encl. 9. The ambiguity must be held to be fatal.

(3) Even if I were to refer to the first article dated 3 December 2003, that article was published before the defendants as the respondents had adequate notice of the terms of the *ex parte* injunction order as per encl. 9. It must be borne in mind that:

(a) the plaintiff served a copy of the *ex parte* injunction order on the assistant company secretary of the first defendant by the name of Indrani a/p Subramaniam after normal working hours at 5.15pm on 2 December 2003 at the registered office of the first defendant as opposed to the publication office;

(b) in reality, Sikandar Batcha bin Abdul Majeed – the managing director of the first defendant, "either by himself or by his representative" collected the *ex parte* injunction order on 3 December 2003 at about 10am (see encl. 29 at para. 7);

(c) the second defendant was served with a copy of the *ex parte* injunction order on 3 December 2003 at 9.15pm (see encl. 26 at para. 11);

(d) the third defendant was served with a copy of the *ex parte* injunction order on 3 December 2003 at 11am (see para. 9.3 of encl. 31);

(e) the sum total of it all, at the very earliest, is that the defendants as the respondents would have good and proper service of the *ex parte* injunction order dated 1 December 2003 was at about 10am on 3 December 2003 as per para. 7 of encl. 29 and by that time the first article had been published; and

(f) the second defendant is an editorial advisor of Malaysia Nanban (see para. 6 of encl. 26) and he is not the editor of Malaysia Nanban as claimed by the plaintiff and that the substantive editor is Rajintheram a/l Muthiah.

(4) In regard to the second article dated 4 December 2003, it must be borne in mind that:

(a) the entire set of the cause papers comprising of the amended writ, the amended statement of claim, the *ex parte* summons in chambers and the plaintiff's affidavit in support of the *ex parte* application were not served on the defendants at the time of service of the *ex parte* injunction order and before publication of the second article. The relevant cause papers were only served on 5 December 2003. So the defendants would not have been aware of the specific terms, phrases and/or issues that would cause them to be in breach of the *ex parte* injunction order;

(b) as I said earlier, the *ex parte* injunction order dated 1 December 2003 is unclear and ambiguous – disparity between the Malay language version and the English language version and so any doubt should be given to the alleged contemnors, who are the defendants here, bearing in mind that the standard of proof required in contempt of court proceedings is beyond reasonable doubt;

(c) the second defendant is not the editor of Malaysia Nanban and he was not involved at any material time in the publication, writing and/or editing of the articles dated 3 December 2003 and 4 December 2003; and

(d) the second article was merely by way of background information as to the plaintiff's action filed against the first and the second defendants as well as the *ex parte* injunction order that was obtained on 1 December 2003.

(5) Peppered with the universal principle of freedom of speech and expression as postulated in art. 10(1)(a) of the Federal Constitution, the second article cannot be said to be contemptuous.

(6) The wrong newspaper was being referred to in the notice of motion in encl. 36 and in the *ex parte* injunction order in encl. 9. It should be "Malaysia Nanban" and not "Malaysian Nanban".

The Session On 30 March 2005

I have perused through the whole file and the written submissions of counsel on both sides in regard to encl. 36 when I mounted the bench on that day. The court was packed with supporters of both the parties. The learned counsel on both sides played to the public gallery. The proceedings were interesting and it went on smoothly. This written judgment was already prepared in draft and I was prepared to hear further oral submissions from the learned counsel on both sides.

I am told that the second defendant by the name of Kumana Pupathi a/l Atimulam @ Athi Kumanan had passed away suddenly on a Monday morning on 28 March 2005. With his sudden demise, a new complexion is added to encl. 36. Section 8(1) of the Civil Law Act 1956 enacts as follows:

> **Effect of death on certain causes of action**
>
> 8(1) Subject to this section, on death of any person all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate:
>
> Provided that this subsection shall not apply to causes of action for defamation or seduction or for inducing one spouse to leave or remain apart from the other or to any claim for damages on the ground of adultery.

Gatley on Libel and Slander, 10th edn at p. 205 carries this pertinent passage:

> **General rule.** Here, too, the rule *actio personalis moritur cum persona* is followed: no action can be commenced against the estate of a deceased defamer and if the defendant dies before verdict the action abates.

Shakespeare in Hamlet I, once said:

> All that live must die
> Passing through nature to eternity.

After hearing the oral submissions of the learned counsel on both sides, I made the following orders:

> Enclosure 36 is to be struck out as against the second defendant (Kumana Pupathi a/l Atimulam @ Athi Kumanan) in view of his untimely demise.
>
> In regard to the position of the principal action as against the deceased, another date for oral submission is hereby given. And that would be on 31.3.2005 at 2.30 p.m.

In regard to encl. 36 pertaining to the first defendant and the third defendant, I made the following order:

> I dismiss enclosure 36 – the notice of motion filed by the applicant plaintiff with costs.

The Session On 31 March 2005

It is apparent that the parties needed time to do an in-depth research as to whether the main suit will survive the death of the deceased. I then made the following orders:

> In regard to the fate of the principal action *vis-à-vis* the deceased, the submissions will be heard on 28.4.2005. On that day too, enclosure 4 is fixed for mention.

I certainly look forward to the next session on 28 April 2005.